Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. and JAMES C. LANDES,

Petitioners,

v.

DAVID A. SOSNE, BANKRUPTCY TRUSTEE,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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198 pp

QUESTION PRESENTED

Whether the Eighth Circuit denied Petitioners due process of law by acting as the fact-finder, after oral argument, on a previously dismissed adversary complaint alleging that a pre-petition assignment of the bankruptcy estate's sole, claimed, asset was a voidable preferential transfer to an insider, without regard for the Petitioners' previously granted jury demand and withdrawal of reference from the Bankruptcy Court, where neither the bankruptcy court nor the District Court considered the claim because it had previously been voluntarily dismissed by the Trustee, the claim was barred by the Statue of Limitations and neither side raised the issue on appeal?

STATEMENT PURSUANT TO RULE 29.6

Petitioners state that the corporate Petitioners have no corporate parents or subsidiaries and that the corporate Petitioners are not publicly traded corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit Court of Appeals reversed a summary judgment entered by the Bankruptcy Court, which had been affirmed by the District Court, on March 13, 1997. The opinion is published at 108 F.3d 881 and reproduced in the Petitioners' Appendix ("Pet. App.") 9a-16a). On remand, the Bankruptcy Court entered the same summary judgment on June 29, 2000. (Pet. App. 137a-150a). The District Court reversed this time, in an unpublished memorandum opinion and judgment entered on June 18, 2001 (Pet. App. 17a-34a). On June 12, 2002, the Eighth Circuit reversed the District Court and reinstated the Bankruptcy Court's second summary judgment. The opinion is published at 293 F.3d 1069 and included in the Appendix. (Pet. App. 1a-8a). The Eighth Circuit order denying rehearing and rehearing en banc (Pet App. 50a-51a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on June 12, 2002, and denied rehearing and rehearing en banc on July 15, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 546(a) (1991)

§ 546(a).

An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of –

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
(2) the time the case is closed or dismissed.

11 U.S.C. § 101 Definitions

§ 101.

(31) "insider" includes –
* * *
(B) if the debtor is a corporation –
(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;
(iv) partnership in which the debtor is a general partner;
(v) general partner of the debtor; or
(vi) relative of a general partner, director, officer, or person in control of the debtor;
* * *
(41) "person" includes individual, partnership, and corporation ***

11 U.S. C. § 547 Preferences

§ 547(b)

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

***

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer-

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor -***

STATEMENT OF THE CASE

On September 28, 1988 Petitioners obtained a judgment against Just Brake Corporate Systems, Inc. (hereinafter "Just Brakes") for actual and punitive damages for fraud, in the Circuit Court of St. Louis County, Missouri. (Pet. App. 151a-158a). The value of that judgment, with interest, is currently in excess of Two Hundred Thousand Dollars ($200,000.00).

While Petitioners were attempting to execute on the only asset of Just Brakes (its trademark) in the State Court, Just Brakes assigned the trademark to F.G.R. Management, Inc. on January 10, 1991. The assignment was then registered with the United States Patent and Trademark Office on February 4, 1991. (Pet. App. 51a-55a).

The State Court scheduled a foreclosure sale of the trademark during July, 1991. On the day of the sale, Just Brakes filed a Chapter 11 bankruptcy petition and the foreclosure sale was cancelled. (Pet. App. 10a). Petitioners moved to dismiss the Chapter 11 bankruptcy arguing that it was essentially a single asset bankruptcy and that neither the Trustee nor the Debtor owned a interest in that asset (the trademark) when the bankruptcy petition was filed. The Bankruptcy Court dismissed the Chapter 11 bankruptcy petition, ruling that the rights of Just Brakes and others could

be adequately protected at less cost in the State Court. (Pet. App. 10a).

The State Court rescheduled the foreclosure sale for October 15, 1991. On the same day, Just Brakes filed its Chapter 7 bankruptcy petition. The State Court proceeded with the sale of the trademark and eventually distributed the net sale proceeds, $100,717.00 to Petitioners. (Pet. App. 10a).

The bankruptcy estate listed a claimed interest in the trademark as its only significant asset. (Pet. App. 61a-63a).

During September and October, 1992, the Trustee filed two adversary complaints against Petitioners. (Pet. App. 56a and 76a). Petitioners immediately filed notices of withdrawal of reference from the Bankruptcy Court and jury demands in both adversary cases. (Pet. App. 64a-68a).

Adversary complaint number one was assigned to Judge Limbaugh while adversary complaint was assigned to Judge Jean Hamilton, in the District Court.

Adversary complaint number two alleged that the January 10, 1991 assignment of the trademark to F.G.R. Management, Inc. was a fraudulent conveyance and was a voidable preferential transfer to an insider less than one year before the bankruptcy petition was filed, under 11 U.S.C. § 547. On February 5, 1993, Judge Hamilton granted the Petitioners' withdrawal of reference and ruled that they were entitled to a jury trial under the holding of **Grandfinanciera S.A. v Nordberg**, 492 U.S. 33 (1989). (Pet. App. 65a-66a).

The Petitioners refrained from filing claims in the bankruptcy case to avoid waiving their jury trial demands and their withdrawals of reference from the Bankruptcy Court. See **Langenkamp v. Culp**, 498 U.S. 42 (1990).

On February 5, 1993, Judge Hamilton had granted the Petitioners' motion to withdraw the reference from the

Bankruptcy Court and granted their jury trial demands (Pet. App. 65a) with respect to adversary complaint number two.

Adversary complaint number one alleged a violation of the automatic stay, 11 U.S.C. § 362, and claimed that the Trustee was entitled to avoid a pre-petition preferential transfer under 11 U.S.C. § 547 which occurred less than ninety days before the bankruptcy petition was filed. Adversary complaint number one also claimed, alternatively, that the foreclosure sale and distribution of the sales proceeds was a post-petition voidable transfer under 11 U.S.C. § 549. In both adversary complaints the Trustee claimed that it was entitled to obtain the trademark or its sales proceeds for the bankruptcy estate under 11 U.S.C. § 550. F.G.R. Management, Inc. was a Defendant in adversary complaint number two, but was not a party to adversary complaint number one.

To avoid the same result (a jury trial in the District Court) in adversary complaint number one, the Trustee amended that complaint to delete all avoidance claims, leaving only the claim that the Trustee was entitled to recover damages because the Petitioners, allegedly, violated the automatic stay provided by 11 U.S.C. § 362. (Pet. App. 69a-75a).

Petitioners objected to the proposed amendment, contending that the Trustee could not recover damages for an alleged violation of the automatic stay unless the Trustee first avoided the January 10, 1991 assignment of the trademark under 11 U.S.C. § 547 and then recovered the proceeds for the bankruptcy estate under 11 U.S.C. § 550. There could be no damages if the Trustee never established a right to avoid the pre-petition assignment. Judge Limbaugh ruled that the Trustee was entitled to eliminate one of his legal theories for recovery (the claims for a voidance) and that by such elimination, that action (adversary complaint number one)

became a summary proceeding involving only administration of the Bankruptcy Code. He then denied the motion to withdraw reference and the jury demand and remanded adversary complaint number one to the Bankruptcy Court on August 24, 1993. (Pet. App. 67a-68a).

In the Bankruptcy Court the Petitioners argued that the automatic stay did not apply because the Debtor did not have an interest in the trademark at the time the Chapter 7 bankruptcy petition was filed where the Trustee had not voided the pre-petition assignment and recovered the proceeds for the bankruptcy estate. The Petitioners argued that the automatic stay applied only when the bankruptcy estate had an interest in the subject property, either because the Debtor owned an interest in the property when the bankruptcy petition was filed or because the Trustee had subsequently acquired an interest in the property. See **In re James**, 275 B.R. 673, 678 (8th Cir. BAP 2001):

> "If the debtors had no legal or equitable interest in the wages transferred to Planters by the check dated March 12, 1999, then there can be no violation of the automatic stay. See 11 U.S.C. § 362(a) [and] 541."

The Bankruptcy Court granted summary judgment against Petitioners in the sum of $100,717.00 and the Petitioners appealed.

The District Court affirmed the Bankruptcy Court. The Eighth Circuit reversed and remanded on March 13, 1997. The Eighth Circuit found that it was not necessary to determine the nature of the Trustee's interest in the trademark at the time of the violation of the automatic stay. (Pet. App. 11a-12a). The Eighth Circuit then ruled, however, that the Trustee had never established its right to avoid the pre-petition

assignment of the trademark or its right to recover the value of the trademark for the bankruptcy estate under 11 U.S.C. §§ 547 and 550. (Pet. App. 14a-15a). The Eighth Circuit ruled that the Bankruptcy Court could return to the question of remedy only after the avoidance issues were finally resolved and that if the Trustee failed to prove his avoidance claim, he would have pursued a lost cause and the expense he incurred would be a self-inflicted wound. (Pet. App. 15a).

Before the first Eighth Circuit opinion, the Trustee had also dismissed adversary complaint number two (the one before Judge Jean Hamilton) without prejudice over the objection of the Petitioners, on February 14, 1995. (Pet. App. 83a-84a; 128a-129a). The Petitioners had objected to the amendment to adversary complaint number one because it eliminated the avoidance claims and the Petitioners' right to a jury trial on the merits of those claims. For the same reasons, the Petitioners also objected to the voluntary dismissal of adversary complaint number two. All avoidance claims were dismissed by the Trustee over the Petitioners objections before the first Eighth Circuit opinion, which noted the dismissals. (Pet. App. 15a).

At the time of the first appeal (1997) all claims for avoidance in both adversary complaints had been dismissed, without prejudice, over the Petitioners objections. Adversary complaint number one had been reduced to a claim for damages for violation of the automatic stay. Adversary complaint number one was so amended during March, 1993. Adversary complaint number two (which included a claim that the assignment of the trademark was a voidable preference as a transfer to an insider) was dismissed, in its entirety, on February 14, 1995.

After remand from the first appeal, a telephone conference was held with the Bankruptcy Court on July 20,

1998. The Trusted argued that it was not necessary to reinstate its claims for avoidance, and that the only remaining issue was for the court to determine the amount of damages for violation of the automatic stay. (Pet. App. 85a-99a). The Petitioners argued that the Trustee must first plead and prove a claim for avoidance, quoting from portions of the first Eighth Circuit opinion. (Pet. App. 87a-88a; 90a). Petitioners also argued that if the Trustee attempted to refile its claims for avoidance, the Petitioners would contend that such claims were barred by the Statute of Limitations.

The Bankruptcy Court concluded that the only issue before it was the amount of damages for the violation of the automatic stay and that it was not necessary to determine any of the avoidance claims. (Pet. App. 95a-98a). The court then directed the parties to file memoranda setting forth their positions on the amount of damages. The Bankruptcy Court also issued an order on July 21, 1998 stating that the issue on remand was the amount of damages and directing the parties to file briefs on that issue. (Pet. App. 100a-102a).

The Trustee then filed its "Memorandum Regarding Damages" claiming, among other things, that the Eighth Circuit opinion was contrary to previous decisions by the Bankruptcy Court (Pet. App. 106a). The Trustee then argued (in his memorandum regarding damages) that the avoidance claims were not before the court, stating:

> "Defendants argue that the only avoidance claim capable of pursuit by the Trustee is the claim to avoid or set aside the assignment of the trademark from the Debtor to FGR Management which would require additional litigation. As noted above, **this is not the issue before the court**."

(Pet. App. 108a).

The Trustee then argued that there were several possible avoidance claims capable of resolution by the Bankruptcy Court, based on the record before it, including the claim that the assignment of the trademark to FGR Management, Inc. was a voidable preferential transfer to an insider (the specific claim which had been dismissed on February 14, 1995 over the objection of the Petitioners). (Pet. App. 108a-110a). The Trustee then proceeded to describe the history of its dismissal of adversary complaint number two before Judge Hamilton. (Pet. App. 111a-112a).

Petitioners responded that the Eighth Circuit opinion required a determination that the pre-petition assignment of the trademark was avoided and the proceeds recovered for the bankruptcy estate, that both adversary complaints for an avoidance had been dismissed by the Trustee, over the Petitioners objections, to avoid the Petitioners jury demands and that the dismissed claims for avoidance were now barred by the Statute of Limitations, 11 U.S.C. § 546(a). (Pet. App. 119a-123a).

The Bankruptcy Court then entered the same summary judgment which had previously been reversed, granting the same summary judgment motion, on June 29, 2000 (Pet. App. 141a) while ruling that the Trustee **might have avoided** the pre-petition assignment of the trademark and **might have recovered** the proceeds for the bankruptcy estate if he had successfully prosecuted such actions. (Pet. App. 142a-143a; 145a; 4a-5a). Apparently this "finding" was made to show that the Trustee had a sufficient "interest" in the trademark to justify voiding the post-petition transfers of the trademark sale proceeds.

None of the dismissed claims for avoidance were refiled, no new pleadings were filed (other than briefs on the issue of

damages) and no evidentiary hearing was held in the Bankruptcy Court after remand.

The Petitioners appealed again to the District Court which, on June 18, 2001, reversed the Bankruptcy Court. (Pet. App. 17a-34a). The District Court concluded that the Trustee had dismissed his avoidance claims, over objection, and refused to attempt to reinstate them. The District Court found that the Trustee and the Bankruptcy Court had failed to follow the law of the case established in the first Eighth Circuit opinion, stating (Pet. App. 23a-24a):

> "The Trustee made no attempt to revive the dismissed avoidance claims; instead arguing that the appellate court's opinion insofar as requiring him to plead and prove the avoidance claims before a remedy could be fashioned was inconsistent with prior bankruptcy court opinions. The Trustee simply reargued the same position as stated in the previously submitted summary judgment motion.
>
> There was no evidentiary hearing before the Bankruptcy Court on remand. The Trustee moved the Bankruptcy Court to revisit the issue of remedy without taking any steps to consider the dismissed avoidance claims. No additional evidence or affidavits (supplementing the record regarding the earlier decision) were submitted or considered by the Bankruptcy Court."

The District Court also found that the Petitioners were not provided with due process notice that the Bankruptcy Court might consider the previously dismissed avoidance claims, citing **Nelson v Adams U.S.A., Inc.**, 529 U.S. 460 (2000). (Pet App. 31a-32a). Finally the District Court found that the claims for avoidance under 11 U.S.C. § 547 were barred by

the Statute of Limitations, 11 U.S.C. § 546(a) (1991), citing **McCuskey, Trustee v Central Trailer Services, LTD**, 37 F.3d 1329, 1330 (8th Cir. 1994). (Pet. App. 32a-33a).

The District Court ruled that the Petitioners were entitled to the proceeds of the Sheriff's sale of the trademark, which had been placed in escrow as required by the first Eighth Circuit opinion. (Pet. App. 17a).

The District Court noted that following the first Eighth Circuit opinion, the Eighth Circuit Bankruptcy Appeal Panel had ruled that a violation of the automatic stay cannot occur where the Debtor, at the time the petition was filed, had no established legal or equitable interest in the property transferred post-petition, citing **In re James**, 257 B.R. 673, 678 (8th Cir. BAP 2001). (Pet. App. 31a).

The Trustee appealed to the Eighth Circuit. The Trustee did not argue, on appeal, that its claim for avoidance of the January 10, 1991 pre-petition assignment of the trademark had been presented to, or decided by, the Bankruptcy Court, or the District Court, but instead argued, contrary to the ruling in the first Eighth Circuit opinion, that it was not necessary for the Trustee to first establish its right to avoid the pre-petition assignment of the trademark in order to recover for the violation of the automatic stay.

On June 12, 2002, the Eighth Circuit issued its second opinion in this case, finding that the Bankruptcy Court and the Trustee failed to follow the law of the case in arguing, and ruling, that it was not necessary to determine the avoidance claims before returning to the issue of remedy. This time, however, the Eighth Circuit concluded that the Bankruptcy Court erred by failing to consider the statement in the Trustee's brief on damages as a claim for avoidance of the pre-petition assignment of the trademark as a voidable preferential transfer to an insider under 11 U.S.C. § 547. The Eighth

Circuit ruled that it was not necessary, for the Trustee to bring new avoidance claims or to replead the dismissed ones. (Pet. App. 3a-5a). The Eighth Circuit ruled that the Bankruptcy Court and the District Court erred in failing to find that the comment in the Trustee's post-remand brief constituted a new claim for avoidance and in failing to rule on that claim for avoidance. The Eighth Circuit also ruled that the assertions by the Trustees in its post-remand brief were supported by the record. The Eighth Circuit then ruled that the equities favor placing the trademark sale proceeds in the bankruptcy estate for the benefit of all creditors. (Pet. App. 6a-7a). The Eighth Circuit was the only court to rule on the facts and the only court (or party) to contend, or believe, that the Trustee's comments in its brief on damages constituted a revival of the previously dismissed (adversary complaint number two) claim that the pre-petition assignment of the trademark was a voidable transfer to an insider in violation of 11 U.S.C. § 547.

F.G.R. Management, Inc. [the assignee and putative insider] was a party to adversary complaint number two but not a party to adversary complaint number one or the bankruptcy case. The only pleadings at issue before the Bankruptcy Court, after remand, was amended adversary complaint number one which had been remanded by Judge Limbaugh to the Bankruptcy Court specifically because the avoidance claims had been intentionally deleted, by amendment, from that complaint. On August 24, 1993, Judge Limbaugh had ruled, in adversary complaint number one, that the Trustee was entitled to eliminate some of his legal theories for recovery (over the objections of the Petitioners) if he chose to do so. Because the avoidance claims were dismissed in adversary complaint number one, it was remanded to the Bankruptcy Court. All claims were dismissed in adversary complaint number two, including all claims against F.G.R.

Management, Inc. which would have been, arguable, a necessary party to the revival of the dismissed claim that the pre-petition assignment of the trademark as a voidable transfer to an insider.

If the Petitioners had known that the Eighth Circuit believed that the Trustee's comments in its brief on damages constituted an attempt to revive the previously dismissed adversary complaint number two, the Petitioners would have, again, filed their motion for removal of reference from the Bankruptcy Court and their jury demand (the two motions which had previously been granted by Judge Hamilton on February 5, 1993).

Petitioners filed a petition for rehearing and/or rehearing en banc on June 24, 2002, arguing that the Eighth Circuit had improperly acted as the fact-finder on a previously dismissed claim, that the Eighth Circuit had improperly denied the Petitioners jury demands, which had previously been allowed by Judge Hamilton on the dismissed claims, that the Petitioners were denied their due process rights to notice and an opportunity to be heard on the dismissed claim for avoidance, that the Eighth Circuit incorrectly determined the facts necessary to support a claim for avoiding a pre-petition transferred to an insider, that the Eighth Circuit improperly acted as a fact-finding court of equity without providing the Defendants with an opportunity to present evidence favorable to them and that the Eighth Circuit improperly determined an avoidance claim after it was barred by the Statute of Limitations. (Pet. App. 35a-49a).

The Eighth Circuit denied the petition for rehearing and for rehearing en banc on July 15, 2002. (Pet. App. 50a).

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the decision of the Eighth Circuit violates the Petitioners rights of due process in numerous respects. On February 5, 1993, Judge Hamilton granted the Petitioners' motion to withdraw reference from the Bankruptcy Court and determined that Petitioners were entitled to a jury trial on the very claim that the Eighth Circuit subsequently determined should have been considered by the Bankruptcy Court on remand. The Petitioners right to a jury trial on the merits was denied because the Trustee dismissed that claim before Judge Hamilton (adversary complaint number two) over the objection of Petitioners on February 14, 1995. Petitioners had refrained from filing claims with the Bankruptcy Court, based on their pre-petition judgment for fraud against the Debtor, because they did not wish to waive their right to a jury trial and their right to withdraw reference from the Bankruptcy Court.

The Eighth Circuit determined that the Trustee should have pursued a claim that the pre-petition assignment of the trademark was voidable under 11 U.S.C. § 547 as a transfer to an insider less than one year before the Bankruptcy Court. This very claim had been filed in adversary complaint number two and dismissed over the objection of the Petitioners to avoid a trial on the merits and to avoid the Petitioners jury demand. Petitioners were unaware that the Eighth Circuit was contemplating that it would decide this dismissed claim until the June 12, 2002 opinion. This issue had not been briefed or even discussed during oral argument, or raised in the appellate briefs.. Due process requires notice of a claim and an opportunity to defend.

The trademark was assigned to FGR Management, Inc. on January 10, 1991 (more than nine months before the bankruptcy petition.). The assignment was registered with the Patent and Trademark Office. The dismissed claim that this pre-petition assignment is voidable as transfer to an insider within one year of the bankruptcy petition under 11 U.S.C. § 547 presents numerous factual issues which are disputed and which were not determined by either the Bankruptcy Court of the District Court. F.G.R. Management, Inc. would seem to be a necessary party to any claim for avoidance of the pre-petition assignment of the trademark to it as an insider in violation of 11 U.S.C. § 547. The Trustee had obtained an order of default against F.G.R. Management, Inc. in adversary complaint number two, in the District Court, but the court denied the Trustee's motion for a default judgment against F.G.R. Management, Inc. Immediately after that denial, the Trustee dismissed adversary complaint number two in its entirety, on the eve of the trial, over the objection of the Petitioners. (Pet. App. 128a-129a).

The dismissed claim for avoidance of the pre-petition assignment of the trademark was also time-barred by the Statute of Limitations before the Eighth Circuit considered the claim on its own motion, after oral argument in the second appeal.

Second, the Eighth Circuit opinion conflicts with previous holdings of this court and of other circuits. This court has repeatedly held that the Circuit Courts of Appeal may not act as fact-finders. Other circuits have held that claims for avoidance of a pre-petition assignment to an alleged insider present issues of fact. Questions of fact may not be determined by the appellate courts, especially when the facts were neither considered nor determined by the lower courts. The first opinion of the Eighth Circuit did not declare that the

previously dismissed claims for avoidance were reinstated by the court on its own motion. The court lacked authority to reinstate dismissed claims of parties who, themselves, are refusing to attempt reinstatement. The court also lacked authority to reinstate a previously dismissed claim which, at the time of the reinstatement, was barred by the Statute of Limitations.

I. The Decision Below Denied Petitioners Due Process Of Law In So Many Respects That Review By This Court Is Warranted.

Prior to August 24, 1993, the Trustee amended adversary complaint number one to avoid a jury trial on the merits and withdrawal of reference from the Bankruptcy Court, by eliminating all avoidance claims. The only remaining claim was for damages for the alleged violation of the automatic stay. This amendment was over the objection of the Petitioners who contended that the Trustee was required to plead and prove a claim for avoidance of the pre-petition assignment of the trademark (the only potentially significant asset of the bankruptcy estate). Adversary complaint number two contained a claim for avoidance of the pre-petition assignment of the trademark on the grounds that it was a voidable preferential transfer to an insider (the very claim the Eighth Circuit later determined on its own motion). On February 5, 1993, Judge Hamilton determined that the Petitioners were entitled to a jury trial on this claim (in the District Court). The Trustee then dismissed adversary complaint number two in its entirety, over the Petitioners objection, on the eve of trial, February 14, 1995.

The Trustee, the Bankruptcy Court, the District Court and the Petitioners all believed, justifiably, that these previously

dismissed claims for avoidance were not pending, and were not before the court, following the remand after the first opinion in **In re Just Brakes**, 108 F.3d 881 (8th Cir. 1997).

The right to due process under the Fifth Amendment to the United States Constitution requires notice of a claim and an opportunity to be heard in opposition. "Judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated." **Nelson v Adams USA, Inc.**, 529 U.S. 460, 471 (2000). See also **In re Banks**, 299 F.3d 296 (4th Cir. 2002) where the court held that a bankruptcy court confirmation order was not entitled to preclusive effect with respect to the Debtor's claim that his student loan debt had been discharged. While the Bankruptcy Court had confirmed the Chapter 13 plan, the Debtor had failed to file an adversary complaint to determine hardship as required by the Bankruptcy Code and rules. The Fourth Circuit held that confirmation of the plan did not preclusively determine such issues, where an adversary complaint had not been filed, because the lender was denied due process notice and an opportunity to defend, citing **Piedmont Trust Bank v Linkous**, 990 F.2d 160, 162 (4th Cir. 1993) and **Mullane v Central Hanover Bank and Trust**, 339 U.S. 306, 314 (1950).

Adversary complaints are required to determine the Trustee or bankruptcy estate's interest in property under 11 U.S.C. § 547 and for the Trustee to recover property, after avoiding a pre-petition transfer, under 11 U.S.C. § 550. An adversary complaint must be served, with summons to obtain personal jurisdiction over the Defendants. See Bankruptcy Rules 7001 and 7004.

Due process notice and the opportunity to defend should especially be allowed for any attempt to revive a previously

dismissed claim which is arguably barred by the Statute of Limitations. Bankruptcy Rules 7001 and 7004 require a new adversary complaint and service of summons to revive the previously dismissed adversary complaint number two.

Without discussion, the Petitioners' previously granted withdrawal of references to the Bankruptcy Court and jury demands were avoided by the Eighth Circuit in **In re Just Brakes Corporate Systems**, 293 F.3d 1069 (8th Cir. 2002). Judge Hamilton had previously allowed the Petitioners' jury demand and granted their motion for withdrawal of reference from the Bankruptcy Court on the very claim that the Eighth Circuit subsequently determined on its own motion. The Petitioners had refrained from filing claims in the bankruptcy case, notwithstanding their pre-petition judgment for fraud against the Debtor, to avoid waiving their right to withdraw reference from the Bankruptcy Court and to avoid waiving their right to a jury trial. See **Grandfinanciera, S. A. v Nordberg**,492 U.S. 33 (1989); **Katchen v Landy**, 382 U.S. 323 (1966) and **Langenkamp v Culp**, 498 U.S. 42 (1990). Due process is denied where a claim subject to a jury demand by the Defendant is dismissed by the Plaintiff then determined, by the Court of Appeals, on its own motion after oral argument in the appeal. That occurred here. See also **A.G. Services of America v Neilsen**, 231 F.3d 726, 730 (10th Cir. 2000). The Seventh Amendment provides a party's right to a jury trial by insuring that factual determination made by a jury are not thereafter set aside by the court, except as permitted under common law. In the same respect, the right to a jury trial on disputed factual issues may not be defeated by dismissal of the claim followed by subsequent consideration of the dismissed claim by a court of appeals, without reinstating the previously demanded and granted jury trial.

A claim for avoidance of a pre-petition assignment of the Debtor's property as a voidable preferential transfer to an insider, presents questions of fact to be determined in the first instance by the fact-finder. Here the fact-finder should have been the jury ordered by Judge Hamilton in adversary complaint number two. Factual issues include whether the assignee (F.G.R. Management, Inc.) is a creditor of the bankruptcy debtor, whether the assignee is an insider and whether the transfer was for new, fair value. None of these facts, which are disputed by the Petitioners, were determined by either the Bankruptcy Court or the District Court. See **In re Chase & Sanborn Corp.**, 904 F.2d 588 (11th Cir. 1990) and **Matter of Fabricators, Inc.**, 926 F.2d 1458, 1466 (5th Cir. 1991): "A determination of insider status is a question of fact and therefore subject to the clearly erroneous standard of review."

While the Eighth Circuit seemed to conclude that Daryl Dunn, President of F.G.R. Management, Inc., was an insider of Just Brakes Corporate System, Inc., he is not the assignee of the trademark. The trademark was assigned to F.G.R. Management, Inc., which would meet the definition of an insider only if F.G.R. Management, Inc. was found to be in control of Just Brakes Corporate System, Inc. 11 U.S.C. § 101(31) and (41). This is a question of fact not considered by either the Bankruptcy Court or the District Court, but apparently assumed by the Eighth Circuit. **Matter of Fabricators, Inc.**, 926 F.2d 1458, 1466 (5th Cir. 1991).

Petitioners also submit that F.G.R. Management, Inc. was a necessary party to any claim that the pre-petition assignment of the trademark was a voidable preferential transfer to an insider in violation of 11 U.S.C. § 547. Petitioners also contend that F.G.R. Management, Inc. does not qualify as a creditor and that any attempt of Just Brakes to describe F.G.R.

Management, Inc. as a creditor would be false and potentially fraudulent. Such creditor status for F.G.R. Management, Inc. is a necessary fact determination before avoiding the pre-petition assignment of the trademark under 11 U.S.C. § 547.

This court has repeatedly ruled that a court of appeals is not permitted to engage in such fact-finding. **Anderson v City of Bessemer**, 470 U.S. 564, 573-576 (1985); **Icicle Seafods, Inc. v Worthington**, 475 U.S. 709, 714-15 (1986):

> "We think that the Court of Appeals was mistaken to engage in such factfinding...it should not simply have made factual findings on its own..."

The Eighth Circuit has previously ruled that a District Court should not engage in outcome determinative fact-finding in an appeal from the Bankruptcy Court, but instead must remand the case to the Bankruptcy Court for the necessary factual determinations. **Wagner v Grunewaldt**, 821 F. 2d 1317, 1320 (8th Cir. 1987). Logic suggests that the Eighth Circuit is also prohibited from making such factual determinations. Here, of course, if the facts on the claim for avoidance of a preferential transfer to an insider are ever to be determined, they should be determined in a jury trial in the District Court pursuant to Judge Hamilton's February 5, 1993 order granting the Petitioners' motion to withdraw reference from the Bankruptcy Court and granting their jury demand. (Pet. App. 65a).

II. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits

The decision below conflicts with the Fourth Circuit's opinion in **In re Banks**, 299 F.3d 296 (4th Cir. 2002). **In re Banks** held that an issue, for which an adversary complaint and summons were required under the Bankruptcy Code and Rules, could not be determined in the bankruptcy case, administratively, as part of the order confirming the Chapter 13 plan. The decision below concluded that a previously dismissed adversary complaint, which had been pending in the District Court with a jury demand, should have been determined administratively, as part of the bankruptcy case as a result of some comments in the Trustee's brief on damages. The Eighth Circuit then proceeded to determine the facts of that "claim" on appeal, even though neither party raised any issue even remotely relating to that "claim".

The decision below also conflicts with the Fifth Circuit opinion in **Matter of Fabricators, Inc.**, 926 F.2d 1458, 1466 (5th Cir. 1991) which held that a corporation may be an insider of a corporate debtor only if that corporation is in control of the debtor corporation, which presents a question of fact to be decided on a case by case basis. Here the Eighth Circuit appears to have determined that Daryl Dunn was an insider of Just Brakes Corporate Systems, Inc. although the assignee of the pre-petition transfer was F.G.R. Management, Inc. (Pet. App. 5a-6a). By definition, a corporation does not become an insider of another corporation just because its president is, allegedly, an officer or director of that corporation. 11 U.S.C. § 101(31) and (41).

A. The Decision Below Conflicts With The Holding Of This Court That Courts Of Appeal Are Not To Act As Tryers of Fact.

Since neither the Bankruptcy Court nor the District Court determined the facts (along with the parties they were unaware that a claim was pending), the Eighth Circuit necessarily determined all facts required to establish that the pre-petition assignment of the trademark was a voidable preferential transfer to an insider in violation of 11 U.S.C. § 547. This court has previously ruled on several occasions that the courts of appeal are not to act as tryers of fact, but are limited to determining whether the findings of fact of the trial court were clearly erroneous (which applies to Bankruptcy Court findings—but here there should have been a jury trial in the District Court). **Anderson v City of Bessemer**, 470 U.S. 564, 573-576 (1985); **Icicle Seafoods, Inc. v Worthington**, 475 U.S. 709, 714-15 (1986) holds:

> "We think that the Court of Appeals was mistaken to engage in such fact finding...it should not simply have made factual findings on its own..."

B. The Decision Below Conflicts With The Holding Of This Court That Due Process Requires Notice Of A Claim An And Opportunity To Be Heard in Opposition.

Neither the Bankruptcy Court, the District Court nor the parties were aware that a claim was pending which alleged that the pre-petition assignment of the trademark was a voidable preferential transfer to an insider in violation of 11 U.S.C. § 547. Accordingly, the parties, the Bankruptcy Court

and the District Court were justified in not presenting evidence, advancing arguments or making determinations of the facts with respect to such "claim". The parties, Bankruptcy Court and District Court were justified in relying on the fact that the Trustee had previously dismissed that claim (adversary complaint number two) over the objection of the Petitioners on February 14, 1995.

This court has previously ruled that the constitutional right of due process under the Fifth Amendment and/or Fourteenth Amendment to the Constitution requires notice of a claim and an opportunity to be heard in opposition. "Judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated." **Nelson v Adams USA, Inc.**, 529 U.S.460-471 (2000).

C. The Decision Below Conflicts With The Holdings Of This Court Which Recognized The Right To Demand A Jury In Adversary Bankruptcy Complaints Heard In The District Courts.

Petitioners were aware that their right to demand a jury trial on adversary complaints number one and two and their right to withdraw reference of those claims from the Bankruptcy Court could be lost if they filed claims against the Bankruptcy estate. See **Langenkamp v Culp**, 498 U.S. 42 (1990). Consequently, the Petitioners did not file claims against the bankruptcy estate in the bankruptcy case, even though they held a State Court judgment for fraud against Just Brakes, precisely because they desired to preserve their right to a jury trial and their right to withdraw reference from the Bankruptcy Court.

This court has previously recognized the Seventh Amendment right to a jury trial on adversary complaints raising claims of this nature. See **Grandfinanciera S.A. v Nordberg**, 492 U.S. 33 (1989) and **Katchen v Landy**, 382 U.S. 323 (1966).

The Petitioners took the necessary steps to avoid waiving the right to a jury trial and their right to withdraw reference form the Bankruptcy Court. On February 5, 1993, Judge Hamilton, in adversary complaint number two, granted the Petitioner's (Defendants) motion to withdraw reference from the Bankruptcy Court and ruled that they were entitled to a jury trial, in accordance with **Grandfinanciera S.A. v Nordbert**, 492 U.S. 33 (1989). (Pet. App. 65a-66a).

The Trustee and the Eighth Circuit, in combination, avoided this constitutional right to a jury trial in the District Court when the Trustee dismissed adversary complaint number two, over objection, on February 14, 1995, and the Eighth Circuit concluded that a statement by the Trustee in its post-remand brief on damages actually reinstated the dismissed claim. Petitioners respectfully submit that due process precludes the Trustee and the Eighth Circuit, in combination, from eliminating their previously granted jury demand and withdrawal of reference from the Bankruptcy Court in this fashion. The decision below conflicts with the decisions of this court in **Langenkamp v Culp**, 498 U.S. 42 (1990), **Grandfinanciera S.A. v Nordberg**, 492 U.S. 33 (1989) and **Katchen v Landy**, 382 U.S. 323 (1966).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN RE JUST BREAKS CORPORATE SYSTEMS
NO. 01-2852
(8th Cir. 2002)

In Re:
Just Brakes Corporate Systems, Inc., Debtor.
David A. Sosne, Trustee, Plaintiff-Appellant,
v.
Reinert & Duree, P.C., et al., Defendants-Appellees.
No. 01-2852.
United States Court of Appeals, Eighth Circuit.
Submitted: January 14, 2002.
Filed: June 12, 2002.

Appeal from the United States District Court for the Eastern District of Missouri.
Before:LOKEN, RICHARD S. ARNOLD and MURPHY, Circuit Judges.
LOKEN, Circuit Judge.

This is an action by a Chapter 7 Bankruptcy Trustee to recover damages from certain judgment creditors for violating the automatic stay. In a prior appeal, we upheld a ruling that Defendants had violated the automatic stay but concluded that the Trustee's proper remedy was limited to compensatory damages and remanded for a determination of those damages. In re Just Brakes Corp. Sys., Inc., 108 F.3d 881 (8th Cir.) *cert. denied*, 522 U.S. 947 (1997). On remand, the bankruptcy court awarded the Trustee the proceeds at issue without determining whether the underlying asset was part of the bankruptcy estate. On appeal, the district court held that this ruling violated the law of the case established by our prior decision and entered judgment for the Defendants. The

Trustee appeals. We agree with the district court that the bankruptcy court's ruling violated our prior remand directions. But we conclude the Trustee established that the asset in question was part of the bankruptcy estate. Accordingly, we reverse and order the bankruptcy court's judgment reinstated.

I. Background

In January 1991, Just Brakes Corporate Systems, Inc. assigned a registered trademark, its only valuable asset, to FGR Management, Inc. a corporation whose president was a shareholder and director of Just Brakes. Defendants sued to have the conveyance set aside as fraudulent to Just Brakes creditors. The state court enjoined Just Brakes from making further transfers and ordered a foreclosure sale of the trademark to satisfy Defendants' prior judgment against Just Brakes. The foreclosure sale was scheduled for October 15, 1991. That morning, Just Brakes commenced this Chapter 7 proceeding, thereby triggering the automatic stay of actions by its creditors to enforce prior judgments or to collect prior claims against Just Brakes or its estate. See 11 U.S.C. §362.(a).

The state court allowed the foreclosure sale to proceed over the objection of FGR Management, with the proceeds to be held in escrow while the parties litigated the validity of the sale and rights to the sale proceeds. The trademark was sold for $105,000. Defendants then moved the state court to award them the net sale proceeds of $100,717, an action that violated the Chapter 7 automatic stay. The state court granted the motion, Defendants were paid the proceeds, and the Trustee commenced this action under § 362(a) to recover the proceeds for the bankruptcy estate. The Trustee also asserted avoidance claims against Defendants and FGR Management seeking to

recover the trademark and its proceeds under 11 U.S.C. §547-550. However, the Trustee later dismissed those claims.

The bankruptcy court ordered Defendants to pay the net proceeds of $100,717 into the bankruptcy estate as compensatory or punitive damages for violating the automatic stay. On appeal, we concluded the Trustee is limited to compensatory relief under 11 U.S.C. §362(a). We ordered the sale proceeds paid into escrow and remanded for determination of compensatory damages. The value of the trademark was not necessarily an appropriate compensatory remedy, we observed, because the Trustee had "never established his right to avoid the debtor's pre-petition transfer and recover the trademark or its value for the estate." In re Just Brakes, 108 F.3d at 885. We further noted that Defendants' violation of the automatic stay may have caused the Trustee to incur additional litigation expenses. We encouraged the bankruptcy court to revisit that issue "after the avoidance issues are finally resolved." Id. at 886.

On remand, Defendants took the position that what we had referred to as "the avoidance issues" could only be determined in a separate avoidance proceeding, and that any such proceeding if commenced by the Trustee would be time-barred. The contention is patently wrong. In this timely proceeding under § 362(a), liability was established on the first appeal, and we remanded for a determination of the Trustee's damages. That determination was to be made in this proceeding, whether or not it involved issues that, absent Defendants' violation of the automatic stay, would have been litigated in a separate avoidance proceeding. We held that the Trustee had to prove the trademark was part of the bankruptcy estate before the full sale proceeds could be awarded as compensatory damages for Defendants' violation of the automatic stay. We did not hold that the Trustee had to bring

new avoidance claims under 11 U.S.C. § 547-550, or otherwise replead those claims, in order to establish the estate's property interest for purposes of this §362(a) proceeding. Unfortunately, the bankruptcy court, the district court, and to a large extent the Trustee accepted Defendants' position in this regard, which caused the proceedings on remand to become seriously misdirected.

Before the bankruptcy court on remand, the Trustee sought to avoid Defendants' mistaken contention by arguing that the bankruptcy court need not address the avoidance issues at all. It was "implicit in the Eighth Circuit Opinion" that the trademark was part of the bankruptcy estate, the Trustee asserted, because there could be no violation of the automatic stay unless the proceeds were derived from a sale of the estate's property. This contention, too, was patently wrong. In the first appeal, we squarely held that we did not need to decide whether the trademark or its proceeds were property of the bankruptcy estate because Defendants violated § 362(a) (6) by taking post-petition action to collect their pre-petition judgment from the trademark proceeds, and that violation "prejudiced the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors." 108 F.3d at 884. Because the avoidance issues were therefore unresolved, we directed the Trustee to prove on remand that the trademark was in fact property of the bankruptcy estate if he wished to recover its proceeds as compensatory damages in this §362 (a) proceeding.

Faced with these competing erroneous contentions, the bankruptcy court concluded that the Trustee is entitled to recover the sale proceeds because the trademark and its proceeds were subject to an avoidance action by the Trustee that "could have resulted in the return of the transferred assets." The district court concluded that this ruling "did not

follow the mandate of the Eighth Circuit on remand." We agree. We reversed the prior award of the proceeds because the Trustee had not established his right to recover the trademark's value for the estate. "The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties and promote judicial economy." Klein v. Arkoma Prod. Co., 73 F.3d 779, 784 (8th Cir.), *cert. denied,* 519 U.S. 815 & 816 (1996); *see* In re Usery, 242 B.R. 450, 457-59 (8th Cir. BAP 1999), *aff'd*, 242 F.3d 378 (8th Cir. 2000), *cert. denied,* 533 U.S. 903 (2001).

Having rejected the bankruptcy court's reasoning, the district court went on to grant judgment in favor of Defendants because "the Trustee never established his power to avoid the pre-petition transfer [of the trademark to FGR Management] and his right to recover the trademark or its value for the estate." If the record supported this conclusion, we would affirm. But it does not. In his initial post-remand brief to the bankruptcy court, the Trustee argued an alternative theory:

It is further clear from the record that the Trustee makes a prima facie case and would be entitled to relief. . . . The Sheriff's seizure [of the trademark] resulted in an involuntary transfer of an interest in satisfaction of an antecedent debt which allowed the creditor (Defendants) to obtain more than it [sic] would have obtained in a Chapter 7 proceeding. See 11 U.S.C. §547. Additionally, if the Court were to allow Defendants to assert that, in spite of their previous legal positions [in state court], that the assignment to FGR was valid, such a transfer is a preference based on the record. This is established as a result of the status of FGR as an unsecured creditor in the amount of $300,000 at the time of the filing of

the bankruptcy Petition. The "look-back" period for such a transfer is one (1) year in the event the creditor is an insider. . . There is no dispute that Daryl Dunn, President of FGR Management, was a twenty-five percent (25%) shareholder and director of the Debtor [and therefore an insider as defined in 11 U.S.C. § 101(31)]. In fact, in an Order in 1991, the Bankruptcy Court found that Daryl Dunn, president of FGR Management, Inc., was a shareholder and director of the Debtor. . . . [Thus,] the record evidence before this Court provides sufficient evidentiary support for the Trustee's prima facie case under § 547.

Defendants did not address this argument in their responsive brief to the bankruptcy court, nor in their brief as appellants to the district court. This alternative argument to the bankruptcy court was consistent with our directions on remand, and the record supports its underlying assertions. Thus, the Trustee was not to blame when the bankruptcy court violated the law of the case by failing to address this contention.

However, the Trustee did fail to pursue this sound alternative contention in defending the bankruptcy court's favorable decision on appeal to the district court, and in arguing this appeal from the district court's adverse decision. We have discretion not to consider a legal theory abandoned on appeal. But in this case we decline to exercise that discretion. It is apparent that the proceedings on remand were misdirected by Defendants' erroneous contention that the Trustee could only prove his entitlement to the sale proceeds in a separate avoidance proceeding that is now barred for various reasons. The Trustee erred in not attacking that contention head-on, and by relying primarily on an argument squarely at odds with our prior opinion. But we remanded for a determination of an appropriate equitable remedy, and the

equities strongly favor placing the trademark sale proceeds in the bankruptcy estate, for the benefit of all creditors. In these circumstances, we are unwilling to sacrifice the interests of those creditors merely because the Trustee made the correct argument in the bankruptcy court, but failed to pursue that argument on appeal.

For the foregoing reasons, we conclude that the bankruptcy court properly ordered Defendants to pay the Trustee $100,717.00, plus interest from October 15, 1991, to the date of payment, for the benefit of the bankruptcy estate. In reaching that decision, the bankruptcy court denied the Trustee an additional award of costs and attorney's fees. That ruling was not an abuse of the court's substantial remedial discretion, particularly in light of the Trustee's decision to dismiss his avoidance claims many years ago, which has resulted in two unnecessary appeals. Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions to reinstate the bankruptcy court's final Order dated June 29, 2000. The parties shall bear their own costs and attorneys' fees for this appeal.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2852		
In Re: Just Brakes Corporate Systems, Inc., Debtor.	*	
David A. Sosne, Trustee, Appellant, vs. Reinert & Duree, P.C., et al., Appellees.	*	Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

June 12, 2002.

A true copy.

ATTEST: Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

In Re: Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997)

In Re:

Just Brakes Corporate Systems, Inc., Debtor.

David A. Sosne, Trustee, Plaintiff-Appellee

v.

Reinert & Duree, P.C., Gary Robbins, Robbins & Associates, Estes & Estes, Inc., James C. Landes, Defendants-Appellants.

No. 96-2078

United States Court of Appeals for the Eighth Circuit.

Submitted: December 11, 1996.

Filed: March 13, 1997

Counsel who presented argument on behalf of the appellant was David M. Duree of St. Louis, MO.

Counsel who presented argument on behalf of the appellee was Steven M. Hamburg of St. Louis. Jeffrey S. Harrold of St. Louis appeared on the brief.

Appeal from the United States District Court for the Eastern District of Missouri.

Before FAGG, FLOYD R. GIBSON and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

[1] Appellants are judgment creditors of a Chapter 7 bankruptcy debtor, Just Brakes Corporate Systems, Inc. ("Just Brakes" or "debtor"). They appeal an order awarding Trustee David A. Sosne $100,717 in damages for appellants' willful violation of the automatic stay. See 11 U.S.C. Section(s) 362. We agree that appellants violated the automatic stay but conclude that the damage award was an improper remedy and therefore reverse.

[2] I. Background.

[3] In 1988, appellants obtained a state court judgment against Just Brakes for $104,583.33. In January 1991, Just Brakes assigned its only valuable asset, a registered trademark, to FGR Management, Inc. ("FGR"). Appellants promptly attacked the transfer as a fraudulent conveyance. The state court agreed, enjoined Just Brakes and FGR from further transfers, and scheduled a foreclosure sale of the trademark to satisfy appellants' judgment. Five minutes before that sale, Just Brakes petitioned for Chapter 11 protection and asserted its own claim to recover the trademark. The foreclosure sale was cancelled.

[4] Appellants persuaded the bankruptcy court to dismiss the Chapter 11 case as "essentially a single asset reorganization case." In dismissing, the court observed that Just Brakes's claim to avoid its pre-petition assignment of the trademark to FGR "is an asset of the Bankruptcy estate," and that the rights of Just Brakes and others asserting claims to the trademark could be adequately protect at less cost in state court.

[5] The parties then returned to state court, and the court scheduled a foreclosure sale of the trademark at noon on October 15, 1991. That morning, Just Brakes filed this Chapter 7 petition. Though notified of the filing, the state court allowed the sale to proceed, ordering that its proceeds be held in escrow while the parties "exhausted their legal remedies contesting the validity of the . . . sale, or until further notice of the court." [fn1] Nine days later, in the action here at issue, appellants applied to the state court and were granted pay-out of the net sale proceeds, $100,717, without obtaining relief from the Chapter 7 automatic stay.

[6] One year later, the Trustee sued to recover the sale proceeds for the bankruptcy court, attacking debtor's January 1991 assignment of the trademark as a fraudulent conveyance,

see 11 U.S.C. §(s) 548, and seeking damages from appellants for willful violation of the automatic stay. When appellants demanded a jury trial of the avoidance issues, the Trustee dismissed that claim, and the district court remanded the case to the bankruptcy court for resolution of the "core" automatic stay issues.

[7] The bankruptcy court granted summary judgment in favor of the Trustee. It found a violation of the automatic stay because appellants applied the trademark proceeds to their pre-petition judgment, knowing that debtor had asserted a claim to recover that asset. Turning to the question of remedy, the court concluded that it may award "[c]ompensation and punishment" for willful violation of the automatic stay in a contempt proceeding, and may also award money damages under its broad Section(s) 105(a) power to issue "necessary or appropriate" orders. It awarded as the "appropriate measure" of damages the $100,717 appellants received from the foreclosure sale. The district court affirmed. Appellants challenge the decision that they violated the automatic stay and the damage award.

[8] II. Violation of the Automatic Stay

[9] Appellants argue that they did not violate the automatic stay when they collected the foreclosure sale proceeds because Just Brakes transferred its entire interest in the trademark in January 1991, and state law does not allow the transferor to avoid a fraudulent conveyance. Acknowledging that the Trustee asserts a claim to recover the trademark for the Chapter 7 estate, appellants argue that claim is neither "property of the estate" nor "property of the debtor" within the meaning of Section(s) 362(a)(2)-(5) until the Trustee has actually recovered the property. Thus, the Trustee's only remedy is to enjoin appellants' collection efforts under

Section(s) 105(a) of the Code, as was done in Celotex Corp. v. Edwards, 115 S.Ct. 1493, 1498-1500 (1995).

[10] The nature of debtor's present interest in the trademark is an interesting question [fn2] but one that we need not resolve because, by collecting the foreclosure sale proceeds, applicants violated Section(s) 362(a)(6), which provides:

> [A] petition filed under . . . this title . . . operates as a stay . . . of (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

[11] Here, the trademark was sold to satisfy appellants' pre-petition "claim against the debtor" – their 1988 judgment. After the sale, appellants applied to the state court and received the sale proceeds out of escrow, clearly an "act to collect" on their judgment. See Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354, 356 (10th Cir. 1991). This act prejudiced the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors and was therefore inconsistent with the basic purpose of the automatic stay, "to prevent creditors from stealing a march on each other." Brown v. Armstrong, 949 F.2d 1007, 1010 (8th Cir. 1991) (quotation omitted). [fn3] The bankruptcy court correctly concluded that appellants violated the automatic stay.

[12] The Appropriate Remedy.

[13] The Trustee urged the bankruptcy court to award money damages under Section(s) 362(h), which provides that "[a]n individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The bankruptcy court ruled that Section(s) 362(h) only applies to "individual" debtors, not to corporate entities such as Just Brakes. We agree. [fn4] As the

Second Circuit persuasively explained, this construction of Section(s) 362(h) is required by the plain meaning of the word "individual," as used in the Bankruptcy Code, supported by the fact that Section(s) 362(h) was added to the Code as part of the "Consumer Credit Amendments" of 1984. See In re Chateaugay Corp., 920 F.2d 183, 186-87 (2nd Cir. 1990); accord In re Goodman, 991 F.2d 613, 619 (9th Cir. 1993); In re Calstar, Inc., 159 B.R. 247, 260 (Bankr. D. Minn. 1993). We reject earlier, contrary circuit decisions that did not give adequate weight to the statute's plain meaning. See In re Atl. Bus. & Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990); Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th Cir. 1986).

[14] Having denied the Trustee Section(s) 362(h) damages, the bankruptcy court went on to conclude that it may compensate and punish for a willful violation of the automatic stay under its inherent contempt powers, or its broad Section(s) 105(a) power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." But the power to punish for a statutory violation is a criminal law power. It must be expressly conferred by Congress, and its exercise is often subject to the procedural safeguards that protect the criminally accused. Even the judicial power to punish for criminal contempt of a court order is carefully distinguished from the power to remedy a violation of that order through civil contempt. See, e.g., Shillitani v. United States, 384 U.S. 364, 368-72 (1966); Combs v. Ryan's Coal Co., 785 F.2d 970, 981 (11th Cir.), cert. denied, 479 U.S. 853 (1986). We conclude that Congress has conferred no power to punish for a violation of Section(s) 362(a), other than the punitive damage authority in Section(s) 362(h).

[15] On the other hand, we agree that bankruptcy courts have broad equitable powers to remedy violations of the automatic stay that injure a corporate debtor's estate. Many courts have said that those who violate the automatic stay "may be held in contempt." In re Computer Commun., Inc., 824 F.2d 725, 731 (9th Cir. 1987). Calling this remedial power contempt overlooks a serious question whether bankruptcy courts have contempt powers after the 1984 Amendments. Compare In re Sequoia Auto Brokers, Ltd., 827 F.2d 1281, 1290 (9th Cir. 1987), with In re Skinner, 917 F.2d 444, 448-50 (10th Cir. 1990). More narrowly, it overlooks the fact that contempt is a remedy for violating court orders, not statutes. See In re Calstar, 159 B.R. at 257-58. Finally, even if a civil contempt power exists, we see little if any need to resort to it in this context because Section(s) 362(a), buttressed by Section(s) 105(a), confers broad equitable power to remedy adverse effects of automatic stay violations. See Celotex, 115 S.Ct. at 1498-99 & n.6; In re Taco Ed's, Inc., 63 B.R. 913, 931-32 (Bankr. N.D. Ohio 1986).

[16] Having limited the scope of the bankruptcy court's remedial powers, we encounter a problem with the remedy awarded in this case, for neither the bankruptcy court nor the district court clarified whether the damages awarded [fn5] were compensatory or punitive. Thus, we must examine whether the bankruptcy court's award – the "value of the voidable transfer that resulted from the violation of the automatic stay" – was properly compensatory.

[17] The bankruptcy court relied upon In re Calstar in awarding the Trustee the value of the trademark as determined by the foreclosure sale. But in Calstar, the bankruptcy court held that the assets in question were part of the debtor's estate before ruling that their value was the appropriate remedy for violation of the stay. See 159 B.R. at 252-53. Here, by

contrast, the Trustee has never established his right to avoid debtor's pre-petition transfer and recover the trademark or is value for the estate. Indeed, the Trustee dismissed his adversary avoidance claims so that he could pursue this Section(s) 362 claim in the bankruptcy court. Thus, the value of the trademark is not an appropriate compensatory remedy. At this state of the proceedings, the Trustee's rights are preserved if appellants are ordered to pay the foreclosure sale proceeds (including interest on the proceeds from October 24, 1991) into escrow pending determination of whether those proceeds now belong to appellants, or to debtor's estate.

[18] In making its damage award, the bankruptcy court observed that appellants' violation of the automatic stay "required the Trustee to incur the additional expense of litigating these actions." But the court made no effort to quantify this expense. In vacating the $100,717 award and substituting an order to pay the proceeds into escrow, we do not foreclose the bankruptcy court from returning to the question of remedy after avoidance issues are finally resolved. For example, if the Trustee proves that the trademark proceeds belong in the debtor's estate, then appellants' violation of the automatic stay has needlessly cost the estate delay and litigation expense. On the other hand, if the Trustee fails to prove his avoidance claim, then the Trustee has pursued a lost cause, and the expense he incurred is a self-inflicted wound.

[19] For the foregoing reasons, the district court's March 29, 1996, order is reversed and the case is remanded for further proceedings consistent with this opinion.

[fn1] No one challenged the state court's decision to complete the foreclosure sale, doubtless because the sale proceeds exceeded the value debtor placed on the trademark in its Chapter 7 schedules.

[fn2] We note that property of the bankruptcy estate is broadly defined in Section(s) 541(a)(1) of the Code. See United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 & n. 9 (1983). But the nature and extent of the debtor's interest in property is governed by state law. See Butner v. United States, 440 U.S. 48, 54-55 (1979).

[fn3] This factor distinguishes this case from cases holding that Section(s) 362(a)(6) does not automatically stay post-petition acts to collect creditors' independent claims against debtors' guarantors. See In re Alcom Corp., 154 B.R. 97, 115-16 (Bankr. D.D.C. 1993) (subsequent history omitted); In re Advanced Ribbons & Office Prods., Inc., 125 B.R. 259, 265 (B.A.P. 9th Cir. 1991).

[fn4] This court has not previously addressed the issue. In Lovert v. Honeywell, 930 F.2d 625 (8th Cir. 1991), we assumed that Section(s) 362(h) damages could be awarded to a corporate debtor and affirmed the denial of damage relief.

[fn5] Damages are not an equitable remedy. Because Congress in Section(s) 362(h) did not grant authority to award damages to corporate debtors, only compensatory equitable remedies are appropriate.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
Just Brakes	)	
Corporate Systems, Inc.,	)	"FILED
Debtor.	)	June 18, 2001
----------	)	U.S. District Court
David A. Sosne, Trustee,	)	Eastern District of MO
Plaintiff-Appellee,	)	St. Louis"
	)	
vs.	)	
	)	Cause No.
Reinert & Duree, P.C.,	)	4:00 CV 1269 SNL
et al.,	)	
Defendants-Appellants.	)	

ORDER

In accordance with the memorandum opinion filed herewith this date,

IT IS HEREBY ORDERED that the memorandum, order, and/or judgment of the Bankruptcy Court, filed June 29, 2000, be and is **REVERSED AND VACATED.**

IT IS FINALLY ORDERED that judgment is entered for the defendants on all issues pending on remand to the Bankruptcy Court.

Dated this 18th day of June, 2001.

(Steven S. Limbaugh)
Senior United States District Judge)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
JUST BRAKES CORPORATE	)	"FILED
SYSTEMS, INC.,	)	June 18, 2001
	)	U.S. District Court
Debtor.	)	Eastern District of MO
	)	St. Louis"
	)	
DAVID A SOSNE, Trustee,	)	
	)	Cause No. 4:00 CV 1269 SNL
Plaintiff,-Appellee,	)	
	)	
v.	)	
	)	
REINERT & DUREE, P.C, et al.,	)	
	)	
Defendants-Appellants.	)	

MEMORANDUM OPINION

This matter is before the Court on appeal from the June 29, 2000 judgment of the Bankruptcy Court, on remand, in favor of plaintiff, David A. Sosne, Trustee, in an adversary proceeding against defendants for the defendants' alleged willful violation of the automatic stay provisions of 11 U.S.C. §362. In its June 29th order and judgment, the Bankruptcy Court adjudged that as equitable compensation for the willful violation of the automatic stay, in connection with the sale of the Debtor's trademark, the defendants were to pay to the plaintiff Trustee for the benefit of the Estate, the amount of $100,717.00 (plus interest). The crux of the instant appeal is the parties' dispute as to whether the Bankruptcy Court's June 29, 2002 order and judgment is consistent with the Eighth

Circuit Court of Appeals' remand opinion.[1] This Court has appellate jurisdiction of this matter pursuant to 28 U.S.C. §158(a). After careful consideration, for the reasons set forth below, this Court reverses the decision of the Bankruptcy Court.

The record establishes the following. In 1988, the defendants obtained a state-court judgment (for fraud) against Just Brakes for $156,000.00. On January 10, 1991 Just Brakes transferred all of its rights, title and interest in its only valuable asset, its trademark "Just Brakes" to FGR Management. Defendants contested the transfer as a fraudulent conveyance and sought state court intervention. The state court found the transfer to be a fraudulent conveyance and enjoined Just Brakes and FGR from any further transfers and scheduled a foreclosure sale with respect to the trademark in order to satisfy the defendants' judgment. Shortly before the sale, Just Brakes filed a Chapter 11 petition and sought to recover the trademark; the sale was cancelled.

Ultimately, the Bankruptcy Court dismissed the Chapter 11 petition. The parties returned to state court and another foreclosure sale of the trademark was scheduled for October 15, 1991. The morning of the foreclosure sale Just Brakes filed a Chapter 7 petition.[2] Although aware of the petition, the state court did not cancel the foreclosure sale; instead, allowing the sale to proceed and ordering that the sale proceeds be held in escrow while the parties sought judicial resolution of their dispute regarding the validity of the sale.

On or about October 24, 1991 the defendants applied for and were granted a pay-out order for the net sale proceeds.

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[1] In re Just Brakes Corporate Systems, 108 F.3d 881 (8th Cir. 1997).

[2] Sometime after the Chapter 7 petition was filed. David A. Sosne was appointed Trustee for the Bankruptcy Estate of Just Brakes.

Defendants sought this pay-out order without first obtaining relief from the Chapter 7 automatic stay.

On September 18, 1992 the Trustee filed the first of two (2) adversary complaints in Bankruptcy Court.[3] In Complaint 1, the Trustee sought the foreclosure sale proceeds by claiming an avoidance of the post-petition transfers of the sale proceeds under 11 U.S.C. §§549 and 550. He also sought damages for the willful violation of the automatic stay. FGR Management was not named as a defendant in this action.

On October 13, 1992 the Trustee filed Complaint 2 in the Bankruptcy Court. In Complaint 2, the Trustee claimed an avoidance of the January 10, 1992 pre-petition transfer of the trademark to FGR Management. FGR Management was named as one of the defendants in this action.

Defendants (not including FGR Management) filed jury demands and motions to withdraw the reference with respect to both complaints. Both adversary complaints were transferred to federal district court. Complaint 1 was assigned to this Court; whereas Complaint 2 was assigned to the Honorable Jean C. Hamilton.

As to Complaint 2, Judge Hamilton determined that the defendants were entitled to a jury trial and set it for trial.

Meanwhile, the Trustee dismissed his avoidance claims in Complaint 1, leaving only the claim regarding the defendants' alleged violation of the automatic stay. Since he dismissed the avoidance claims, the Trustee then sought to have the jury demand denied and the complaint remanded to the Bankruptcy Court. This Court found that, in light of the dismissal of the avoidance claims in Complaint 1, the Trustee could still have his pending avoidance claims in Complaint 2

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[3] For purposes of reference, the Court will refer to these complaints as Complaint 1 and Complaint 2.

tried before a jury, and therefore, no on e would be prejudiced by remanding Complaint 1 to the Bankruptcy Court.

Upon remand of Complaint 1 to the Bankruptcy Court, the Bankruptcy Court ruled that the defendants had violated the automatic stay by procuring the pay-out order for the proceeds of the foreclosure sale of the trademark. The Court granted the Trustee's summary judgment motion, and awarded the Trustee damages in the amount of $100,717.00.

As to Complaint 2, on the eve of trial (February 14, 1995), the Trustee dismissed Complaint 2 in its entirety over the objections of the defendants.

Defendants appealed the granting of summary judgment on Complaint 1 as to the violation of the automatic stay to this Court. This Court affirmed the Bankruptcy Court's decision. Defendants then appealed to the 8th Circuit Court of Appeals, which upheld the finding of a violation of the automatic stay, but reversed and remanded as to the judgment for damages against the defendant. *See,* In re Just Brakes, 108 F.3d 881 (8th Cir. 1997).

The appellate court agreed that the defendants had violated the automatic stay by applying the foreclosure proceeds to their pre-petition judgment knowing that the Trustee had asserted a claim to it for the Chapter 7 estate. "This act prejudiced the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors and was therefore inconsistent with the basic purpose of the automatic stay, 'to prevent creditors from stealing a march on each other'." In re Just Brakes, 108 F.3d at 884 (citations omitted).

However, the appellate court reversed the award of damages as being an inappropriate remedy. It concluded that bankruptcy courts only have broad equitable powers to remedy violations of the automatic stay, and that damages are not an equitable remedy. Id., 108 F.3d at 885. The appellate court

reasoned that even if the Bankruptcy Court had intended to qualify the award to the Trustee as a compensatory equitable remedy, a major stumbling block still existed because the Bankruptcy Court had never determined that the trademark was an asset of the debtor's estate prior to ruling that its value (i.e., the foreclosure sale proceeds) was the appropriate remedy for violation of the stay.

> "Here, by contrast, the Trustee has never established his right to avoid debtor's pre-petition transfer and recover the trademark or its value for the estate. Indeed, the Trustee dismissed his adversary avoidance claims so that he could pursue this §362 claim in bankruptcy court. Thus, the value of the trademark is not an appropriate remedy. At this stage of the proceedings, the Trustee's rights are preserved if appellants are ordered to pay the foreclosure sale proceeds (including interest on the proceeds from October 24, 1991) into escrow pending determination of whether those proceeds now belong to appellants, or to debtor's estate."

Id., 108 F.3d at 885.

The appellate court found that even assuming that the automatic stay provision had been violated by the act of applying post-petition foreclosure funds to a pre-petition judgment, no remedy could be fashioned until such time the Trustee had pleaded and proven its avoidance claims. Furthermore, without a showing that the trademark or its value was an asset of the estate in the first place, there was no support for the lower courts' findings that the Trustee had incurred necessary additional litigation expenses. In summarizing its decision, the appellate court was quite clear in

its reasoning behind its decision and its expectations on remand:

> "In vacating the $100,717.00 award and substituting an order to pay the proceeds into escrow, we do not foreclose the bankruptcy court from returning to the question of remedy after avoidance issues are finally resolved. For example, if the Trustee proves that the trademark proceeds belong in the debtor's estate, then appellants' violation of the automatic stay has needlessly cost the estate delay and litigation expense. On the other hand, if the Trustee fails to prove his avoidance claim, then the Trustee has pursued a lost cause, and the expense he incurred is a self-inflicted wound."

Id., 108 F.3d at 886. The Eighth Circuit reversed the district court's order affirming the Bankruptcy Court's opinion, and remanded "for further proceedings consistent with this opinion." Id., at 886.

On June 17, 1998, after remand (first to the district court, then to the Bankruptcy Court), the defendants established an escrow fund in the sum of $138,000.00 to cover the proceeds of the foreclosure sale on October 15, 1991 and accrued interest.

The Trustee made no attempt to revive the dismissed avoidance claims; instead arguing that the appellate court's opinion insofar as requiring him to plead and prove the avoidance claims before a remedy could be fashioned was inconsistent with prior bankruptcy court opinions. The Trustee simply reargued the same position as stated in the previously submitted summary judgment motion.

There was no evidentiary hearing before the Bankruptcy Court on remand. The Trustee moved the

Bankruptcy Court to revisit the issue of remedy without taking any steps to consider the dismissed avoidance claims. No additional evidence or affidavits (supplementing the record regarding the earlier decision) were submitted or considered by the Bankruptcy Court.

On June 29, 2000 the Bankruptcy Court issued another Memorandum and (separate) Order again granting the Trustee's previously filed summary judgment motion and awarded the Trustee as "equitable compensation for willful violation of the automatic stay of 11 U.S.C. §362(a)" $100,717.00 for the "benefit of the estate".

The Bankruptcy Court decided that, on remand, the only issue to be considered "concerns the appropriate remedy for a willful violation of the automatic stay that is available to a Chapter 7 Trustee on behalf of the estate of a corporate debtor." Bankruptcy Court Memorandum, dated June 29, 2000, pg. 3. Without any consideration of the status of the case as it now stood before the Court (i.e., all avoidance claims having been dismissed by the Trustee and FGR Management no longer a party to the case), the Bankruptcy Court determined that the defendants' violation of the automatic stay deprived the bankruptcy estate of its interest in the Debtor's trademark. Bankruptcy Court Memorandum, at pg. 4.[4]

The Bankruptcy Court supported its ultimate decision with a series of legal presumptions: Firstly, with respect to the pre-petition transfer of the trademark by Just Brakes to FGR Management, and the state court-ordered pre-petition transfer of the proceeds of the sale of the Debtor's trademark, the

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[4] Unless otherwise noted, all references to the Bankruptcy Court's Memorandum are to the Memorandum filed June 29, 2000.

Bankruptcy Court stated that these transfers were subject to avoidance proceedings by the Trustee under Sections 547 and 548, and the Trustee's ability to recover property or value under Section 550. However, after chastising the defendants for inhibiting the Trustee's ability to pursue some course of action "for the benefit of all creditors", the Bankruptcy Court speculated that "[t]he Trustee's successful prosecution of these actions **could have resulted in the return of the transferred assets, or a recovery of their value for the benefit of all creditors of the estate.**" Bankruptcy Court Memorandum, pg. 6. The Bankruptcy Court then went on to acknowledge that the defendants had asserted a general unsecured claim against the Debtor that was based on the 1988 Missouri Circuit Court judgment; however, could not find any evidence in the record that at the commencement of the bankruptcy case or shortly thereafter, "the Defendants held any interest in the trademark or the proceeds of the sale of the trademark that was greater than the interest of the Trustee on behalf of the bankruptcy court." Furthermore, the Bankruptcy Court determined that the post-petition transfers; i.e., the sale of the trademark and the pay-out of the proceeds to the defendants, were violations of the automatic stay, and thus, *void ab initio* pursuant to the case of LaBarge v. Vierkant (In re Vierkant), 240 B.R. 317, 325 (8th Cir. B.A.P. 1999). Just as it had with the pre-petition transfers, the Bankruptcy Court again found that the post-petition transfers were subject to avoidance proceedings by the Trustee under Sections 549, and recovery proceedings under 550. Once again, it speculated that "[t]he Trustee's successful prosecution of these actions **would have resulted in the recovery of the sale proceeds for the benefit of all creditors of the estate.**" Bankruptcy Court Memorandum, pg. 8.

The Bankruptcy Court summarized its means of reaching its determination as follows:

> "In view of the recent decisional law and determinations referred to in this Memorandum, the matter on remand is limited to fixing the remedy for a violation of the automatic stay. It does not require a determination of the extent of the estate interest in pre-petition assets or post-petition assets; or an extensive examination of the probability of the success of any Trustee actions under Chapter 5 of the Bankruptcy Code to avoid pre-petition or post-petition transfers. An estate interest in the assets has been established; the estate interest has not been shown to have been defeated or subordinated by the Defendants' pre-petition interests' and the Trustee's power to avoid transfers and recover property is well-grounded in federal and state law as noted above."

Bankruptcy Court Memorandum, pg. 9.

On July 3, 2000 the Bankruptcy Court ordered the defendants to increase the escrow amount. On July 11, 2000 defendants filed this appeal; they also filed an alternative motion for a one-day extension to July 11, 2000 to file a notice of appeal which the Bankruptcy Court granted.

Defendants argue several grounds for reversal of the Bankruptcy Court's June 29, 2000 memorandum and order. Primarily, they assert that 1) the Bankruptcy Court failed to follow the Eighth Circuit's opinion of March 13, 1997 by fashioning a remedy without requiring the Trustee to first plead and prove a claim for avoidance of the January 1991 pre-petition transfer of the trademark to FGR Management; 2) the Bankruptcy Court erroneously considered the post-petition transfers to be *void ab initio* without first having the Trustee

plead and prove his avoidance claim regarding the pre-petition transfer and thereby establishing his right to recover the trademark or its value for the benefit of the estate; 3) the Bankruptcy Court failed to give the defendants due notice that it would consider again the import of the avoidance claims that the Trustee had previously dismissed; and 4) the Trustee's failure to plead and prove the avoidance claims is fatal to any consideration of remedy because the statute of limitations has run on the Trustee's ability to assert any avoidance claims.[5] Defendants assert that even if they violated the automatic stay; no remedy can be fairly and equitably fashioned given the posture of the case; thus, the judgment of the Bankruptcy Court on June 29, 2000 should be reversed and judgment entered for the defendants.

On an appeal, the United States District Court may affirm, modify, or reverse a judgment, order, or decree of a bankruptcy judge, or remand to the bankruptcy court with instructions for further proceedings. This Court must affirm the decision of a bankruptcy court if it is supported by law and the facts contained in the record. In reviewing a bankruptcy court's ruling, the bankruptcy court's legal conclusions are reviewed *de novo*, while its findings of fact are reviewed under a "clearly erroneous" standard. In re Apex Oil, 884 F.2d 343, 348 (8th Cir. 1989); Wegner v. Grunewaldt, 821 F.2d 1317, 1320 (8th Cir. 1987); Pronto Enterprises v. United States, 188 B.R. 590, 591-92 (W.D.Mo. 1995), Spackler v. Boatmens' National Bank, 165 B.R. 267 (E.D.Mo 1993). Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of a bankruptcy court to judge

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[5] The defendants also assert other grounds for reversal; however, the Court believes that those referenced above are the most significant and dispositive of the Court's ultimate ruling in this appeal.

the credibility of the witnesses. In re Apex Oil, at 348; In re Van Horne, 823 F.2d 1285, 1297 (8th Cir. 1987); In re Martin, 761 F.2d 472, 474 (8th Cir. 1985). Under Bankruptcy Rule 8013, findings of a fact are clearly erroneous when they are not supported by substantial evidence, contrary to the clear preponderance of the evidence, or based on an erroneous view of the law. In re Cook, 72 B.R. 976 (W.D.Mo. 1987). It is incumbent upon the reviewing court to review the entire evidentiary record because "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 500 (8th Cir. 1991) *quoting* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *see also,* In re Apex Oil, at 348. The abuse of discretion standard, applicable to questions of law, is indistinguishable from the clearly erroneous standard in its application. In re Usery, 242 B.R. 450, 457 (8th Cir. BAP 1999) *citing* In re Forbes, 215 B.R. 183, 187, n. 6 (8th Cir. BAP 1997).

The Court has carefully reviewed the Eighth Circuit's opinion and the Bankruptcy Court's June 29,2000 memorandum and finds that the Bankruptcy Court's actions are inconsistent with the mandate of the appellate court.

The law of the case doctrine prevents relitigation of a settled issue in a case and requires that courts follow decisions made in earlier proceedings to insure uniformity of decisions, protect the expectations of the parties, and promote judicial economy. In re Usery, at 457; Klein v. Arkoma Products Co., 73 F.3d 779, 784 (8th Cir. 1996) (citations omitted). When a case has been decided by the appellate court and remanded to the district court, every question decided by the appellate court, whether expressly or by necessary implication, is finally

settled and determined. In re Usery, at 457; Klein, at 784. The district court is bound by the appellate court's decree and must carry it into execution according to the mandate. Klein, at 784; In re Williams, 256 B.R. 885, 895 (8th Cir. BAP 2001); In re Usery, at 457 (citations omitted). The lower court may not "alter it, examine it except for purposes of execution, or give any further or other relief or review it for apparent error with respect to any question decided on appeal." Klein, at 784-85 *quoting* Thornton v. Carter, 109 F.2d 316, 319-20 (8th Cir. 1940). The lower court's actions should not be inconsistent with either the letter or spirit of the mandate. In re Williams, at 895 *citing* Quern v. Jordan, 440 U.S. 332, 347 n. 18 (1979). Finally, the lower court is not bound by its own earlier rulings unless explicitly or implicitly adopted by the appellate court. In re Usery, at 457 (citations omitted).[6]

In its opinion, the Eighth Circuit clearly found that the Trustee had never established his right to avoid Just Brake's pre-petition transfer and recover the trademark or its value for the estate. In re Just Brakes, 108 F.3d at 885. Realizing that this fundamental issue had never been settled, the Eighth Circuit expressly stated that the lower court is free to revisit the issue of remedy "after the avoidance issues are finally resolved." Id. at 886. It went on to further explicitly point out the obstacles facing the Trustee; if he should prove the trademark proceeds belong in the bankruptcy estate, then he is entitled not only to the proceeds but also costs and litigation expenses; however, if the Trustee should fail to prove his avoidance claim, then "the trustee has pursued a lost cause,

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[6] The principles espoused by the law of the case doctrine are applicable not only to a district court on remand, but as in this case, a bankruptcy court on remand.

and the expense he incurred is a self-inflicted wound." Id., at 886.

This Court agrees that a Trustee's power to avoid transfers and recover property for the estate may be well-grounded in federal and state law; however, this particular Trustee's power to avoid the pre-petition transfer and right to recover the trademark or its value has never been adjudicated in this case – a point specifically noted by the appellate court. Without any hearing or submission of evidence, the Bankruptcy Court simply suggested that the Trustee would have been successful in his prosecution of the avoidance claim and that this speculative successful action could have resulted in the return of the transferred assets or recovery of the sale proceeds for the estate. Unfortunately, all that can exist is conjecture because at the time of the remand, all the avoidance claims had been previously dismissed by the Trustee.

The Eighth Circuit clearly mandated that on remand the Trustee had to establish his right to avoid the transfers and recover the trademark or the sale proceeds before the Bankruptcy Court could "return to the issue of remedy." This simply was not done. Any findings by the Bankruptcy Court regarding the Trustee's power to avoid the transfers and right to recover the trademark or its value is clearly erroneous. Its ultimate decision to award the Trustee the sale proceeds was an abuse of its discretion. The Bankruptcy Court failed to follow the mandate of the Eighth Circuit on remand; thus, its judgment must be reversed.

Furthermore, since the Bankruptcy Court failed to require the Trustee to plead and prove his pre-petition avoidance claim, its subsequent decision that the post-petition transfer/sale was *void ab initio* is unsupported by law and the facts contained in the record. Since the Trustee never established his power to avoid the pre-petition transfer and his

right to recover that trademark or its value for the estate, no damage to the estate has ever been proved because of the defendants' violation of the automatic stay.[7]

Furthermore, as of 1993, the Trustee had dismissed all of his avoidance claims and failed to replead them on remand, yet the Bankruptcy Court's considered the supposed success of these dismissed avoidance claims in fashioning its remedy for the defendants' violation of the automatic stay. The Bankruptcy Court failed to give the defendants any notice that it would consider these dismissed claims; thus, depriving the defendants the opportunity to present any additional defenses to the claims themselves or to the issue of the Bankruptcy Court considering dismissed claims. This lack of notice regarding the Bankruptcy Court's consideration of the abandoned avoidance claims violated the defendants' due process rights. Due process protects a party's right to contest on the merits their liability. In Nelson v. Adams USA, Inc.,

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[7] The Court wishes to make two (2) points regarding the Bankruptcy Court's determination that the post-petition actions were *void ab initio*. Firstly, there is a split of authority as to whether an action taken in violation of the automatic stay is *void ab initio* or merely voidable. As noted by the Bankruptcy Court, in In re Vierkant, *supra*, the BAP held that an action taken in violation of the automatic stay was *void ab initio*; however, in In re Williams, 257 B.R. 297 (Bankr. W.D.Mo. 2001) and In re Lett, 238 B.R. 167 (Bankr. W.D.Mo. 1999), the Bankruptcy Court held that an action taken in violation of the automatic stay was merely voidable. In fact, in its earlier decision regarding this bankruptcy case, the Bankruptcy Court had noted that the post-petition actions were "at least voidable." In re Just Brakes, 175 B.R. 288, 291 (Bankr. E.D.Mo. 1994). Secondly, recognizing that the Eighth Circuit has already found that the defendants' actions were taken in violation of the automatic stay, this Court still feels compelled to note that if a debtor has no established legal or equitable interest in the property transferred post-petition, then there can be no violation of the automatic stay. In re James, 257 B.R. 673, 678 (8th Cir. BAP 2001).

529 U.S. 460 (2000), the United States Supreme Court found that the sole corporate shareholder's due process rights had been violated when the district court engaged in judicial speculation that he would likely have been liable for award of attorneys' fees against the corporation if he had been a party to the litigation; thus, the district court had impermissibly allowed the amendment of the judgment immediately after allowing the amendment of the pleading. "We say instead that judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated." Nelson v. Adams USA, Inc., 529 U.S. at 471.

Finally, the posture of this case on remand presents a serious problem with regard to any court's ability to remedy the defendants' violation of the automatic stay. As the Eighth Circuit Court of Appeals made clear the Trustee had never prosecuted his avoidance claims; thereby, had never established his right to recover the trademark or its value for the estate. It is simply too late for him to pursue these claims now.

11 U.S.C. §546(a)(1991) provides:

> An action or proceeding under Section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of:
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.[8]

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[8] In 1994, Section 546(a) was amended and changed the limitation times to 2 years after the entry of the order of relief or 1 year after the appointment or election of the first trustee. The amendment applies only to bankruptcy

Prior to August 24, 1993, the Trustee dismissed all avoidance claims in Complaint 1 (the subject of the remand). In February 1995, the Trustee dismissed Complaint 2 in its entirety; including any and all avoidance claims originally alleged therein. Thus, as of June 29, 2000 there were no pending avoidance claims for the Bankruptcy Court to consider. The Eighth Circuit was well-aware that the avoidance claims had been dismissed since it noted same in its recitation of the background of this case. The Trustee and the Bankruptcy Court made the affirmative decision not to replead or somehow revive the avoidance claims on remand. This was a fatal mistake.[9] Section 546(a) undeniably restricts the filing of any avoidance claims to within two years of the appointment of the trustee. *See*, McCuskey, Trustee v. Central Trailer Services, Ltd., 37 F.3d 1329, 1330 (8th Cir. 1994). In the present case, Trustee Sosne was appointed in October 1991; thus, the limitations period for the filing of any avoidance claims has long expired. Even if an argument for equitable tolling were made, such an argument would be meritless under the circumstances in this case. "Equitable tolling prevents the limitations period of Section 546(a) from expiring when the trustee, despite the exercise of due diligence, is prevented from asserting a cause of action because the trustee is unaware of the cause of action as a result of fraud or because of extraordinary circumstances beyond the

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cases filed after October 22, 1994. The present bankruptcy case was filed on October 15, 1991; thus, the 1994 amendment is not applicable.

[9] The Eighth Circuit suggested that the Bankruptcy Court should revisit the avoidance issues and "finally resolve[d]" them before fashioning a remedy. This Court has no opinion as to whether, given the applicable statute of limitations, the Trustee would have been able to replead the avoidance claims on remand. Since he chose not to do so, the issue need not be addressed.

trustee's control which make it impossible to file the action within the limitations period." In re Bodenstein, 253 B.R. 46, 50 (8th Cir. BAP 2000). Here, the Trustee voluntarily chose to dismiss **all** avoidance claims as of February 1995; there is nothing in the record to show any fraud or extraordinary circumstances which encouraged this decision. "One who fails to act diligently cannot evoke equitable principles to excuse a lack of diligence." In re Bodenstein, at 50 (citations omitted).

The Trustee's avoidance claims were time-barred as of June 29, 2000. Since the Bankruptcy Court considered the speculative merits of time-barred avoidance claims as support for the remedy fashioned, the judgment of the Bankruptcy Court cannot stand.

It is this Court's considered opinion, for the above-referenced reasons, that the decision of the Bankruptcy Court must be reversed and its judgment awarding "equitable compensation" to the Trustee must be vacated. This decision does not come easily. The Trustee's decision to dismiss the avoidance claims and not replead them, and the Bankruptcy Court's failure to follow the mandate of the appellate court on remand, created the unique situation wherein a violation of the automatic stay has been adjudicated but no equitable remedy can be fashioned. Under the circumstances, the defendants are entitled to retain the post-petition sale proceeds.

For the foregoing reasons, the June 29, 2000 memorandum, order and/or judgment of the Bankruptcy Court will be reversed and vacated, and judgment will be entered for the defendants on all issues.

Dated this 18th day of June, 2001.

(Stephen Limbaugh)
Senior United States District Judge

APPEAL NO. 01-2852

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE:
JUST BRAKES CORPORATE SYSTEMS, INC.

DAVID A. SOSNE, TRUSTEE,
Plaintiff-Appellant,

vs.

REINERT & DUREE, P.C., GARY ROBBINS,
ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC.
and JAMES C. LANDES,
Defendants-Appellees.

Arising out of the United States District Court No.
4:00CV1269SNL

PETITION FOR REHEARING AND/OR FOR REHEARING EN BANC

DAVID M. DUREE
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Attorney for Defendants-Appellees

PETITION FOR REHEARING AND/OR FOR REHEARING EN BANC

Defendants-appellants petition the Court for rehearing pursuant to F.R.A.P. §40 and/or for rehearing en banc pursuant to F.R.A.P. §35, as follows:

FACTS

Just Brakes transferred all interest in the trademark to F.G.R. Management on January 10, 1991. During July, 1991, Just Brakes filed a Chapter 11 bankruptcy petition to avoid a sheriff's sale of the trademark scheduled for July 15, 1991. The sale was stopped as a result of the bankruptcy. The Chapter 11 bankruptcy petition was then dismissed. The bankruptcy court found that judicial economy would be better served if Just Brakes and affiliated parties pursued their claims to the trademark in state court. The sheriff's sale was rescheduled for October 15, 1991. On that day, Just Brakes filed its Chapter 7 bankruptcy petition. The sheriff proceeded with the sale of the trademark and the state circuit court subsequently distributed the proceeds to the defendants.

The defendants hold a fraud judgment against Just Brakes based upon a fraudulent franchising scheme involving the trademark "Just Brakes". All major creditors who have filed claims in the bankruptcy court are parties which assisted Just Brakes in the fraud, including F.G.R. Management and Francorp. F.G.R. Management also participated in the January 10, 1991 transfer of the trademark to preclude the defrauded defendants from executing on the trademark to satisfy their fraud judgment.

During October, 1992, the Trustee filed two adversary complaints. The defrauded defendants did not file claims in

the bankruptcy court, to avoid waiving their rights to jury trials. The defendants immediately filed jury demands and withdrawals of reference to the bankruptcy court, in both cases. Complaint No. 1 was assigned to Judge Limbaugh. Complaint No. 2 was assigned to Judge Jean Hamilton.

Complaint No. 1 alleged a violation of the automatic stay and claimed an avoidance of a pre-petition preferential transfer under 11 U.S.C. §547, claiming a preferential transfer less than 90 days before the bankruptcy petition. It also claimed, alternatively, post-petition voidable transfers under 11 U.S.C. §549. See the Joint Appendix at 736-741 (JA-736-741).

Complaint No. 2 included F.G.R. Management as a defendant, alleged a fraudulent conveyance with respect to the January 10, 1991 assignment of the trademark and also claimed a voidable preference, contending that the trademark was transferred to F.G.R. Management, as an insider, less than one year before the Chapter 7 bankruptcy petition was filed, under 11 U.S.C. §547.

Judge Hamilton granted the defendants' jury demand because the claims of fraudulent conveyance and a voidable preferential transfer to an insider raised issues of fact on which the defendants were entitled to a jury trial, as demanded, under the Seventh Amendment and Fed.R.Civ.P. 38. To avoid the same ruling in complaint No. 1 (before Judge Limbaugh), the Trustee amended that adversary complaint to delete all claims for avoidance or preferential transfer and limited the complaint to a claim that the defendants violated the automatic stay, over the defendants' objection. Amended complaint No. 1 was filed during August, 1993. Judge Limbaugh allowed the amendment, concluding that the Trustee was **entitled to eliminate one of his legal theories** for recovery (the voidable preferential transfer and avoidance claims) and that by

eliminating these claims, the right to a jury trial was eliminated. Case No. 1 was then remanded to the bankruptcy court. (JA-623, 625, 626, 683). Judge Limbaugh also ruled that the defendants would have their jury trial on the interrelated claims of voidable preferential transfers, fraudulent conveyances and other avoidance issues in the case pending before Judge Hamilton.

The bankruptcy court then granted summary judgment, awarding the entire value of the trademark as damages, while finding that the defendants had violated the automatic stay. There had been no finding on the avoidance or preferential transfer to an insider claims, which were still pending before Judge Hamilton. The Trustee then dismissed the case pending before Judge Hamilton, again over the objection of the defendants. The dismissal was without prejudice, on February 14, 1995. (JA-21).

State law determines the nature and extent of a bankrupt debtor's interest in property. In re N.S. Garrott & Sons, 772 F.2d 462, 467 [7, 8] (8th Cir. 1985); Butner v. United States, 440 U.S. 48, 54-55 (1979).

The interlocutory rulings of the Missouri state court did not result in a final state court judgment entitled to preclusive effect under Missouri law. Accordingly, the federal court could not give preclusive effect to those interlocutory orders under 28 U.S.C. §1738.

In any event, any finding by the Missouri state court that the January 10, 1991 assignment of the trademark was a fraudulent conveyance would not have restored a property interest in the trademark in Just Brakes. Such finding would merely have voided the transfer with respect to the defendants' judgment execution rights. Just Brakes would still have no property interest in the trademark. Kahn v. Royal Banks of

Missouri, 790 S.W.2d 503, 506 [1,2] (Mo. App. 1990); Loe v. Downing, 325 S.W.2d 479, 482 [2] (Mo. App. 1959).

11 U.S.C. §541 (a) (2) and (3) limit the property of the bankruptcy estate to all interests in property of the debtor at the time the bankruptcy petition is filed (there were none) and any interest in property that the Trustee subsequently recovers under 11 U.S.C. §547, 548, 549 and 550. At the time of the alleged violations of the automatic stay, the bankruptcy estate had no property interest in the trademark because Just Brakes had no interest at the time that the bankruptcy petition was filed, and the Trustee had not recovered any interest in the trademark for the bankruptcy estate. **From its inception until June 12, 2002, the bankruptcy estate was assetless.**

In In re Just Brakes I, the Eighth Circuit found that the defendants violated the automatic stay by interfering with the Trustee's efforts to litigate claims for avoidance, under 11 U.S.C. §362 (a)(6). (A-2). That decision conflicts with a recent opinion of the Eighth Circuit Bankruptcy appellate panel. *See,* In re James, 275 B.R. 673, 678 (8th Cir. BAP 2001):

> If the debtors had no legal or equitable interest in the wages transferred to Planters by the check dated March 12, 1999, then there can be no violation of the automatic stay. See 11 U.S.C. § 362(a) [and] 541.

The law of the case precludes the defendants from rearguing this point. In In re Just Brakes I, however, the Eighth Circuit reversed and remanded, stating that the bankruptcy court could return to the question of remedy **only after** the avoidance issues were finally resolved. (A-4).

The avoidance claims, including the claim of a voidable preferential transfer to an insider, had previously been specifically pleaded, then dismissed, over the defendants' objections **twice**, to avoid the defendants' jury demands.

In re Just Brakes I did not declare that the dismissed avoidance claims had been reinstated. The Trustee thereafter made no effort to reinstate the dismissed claims, flatly refusing to attempt to reinstate them. The Trustee, the defendants, the bankruptcy court, and the district court all realized that the bankruptcy court could not determine claims that had been specifically dismissed (to avoid jury trials in the district court) without at least a finding and/or a request to reinstate the claims. Of course, if the claims had been reinstated, defendants would have again filed their jury demands and withdrawals of reference from the bankruptcy court. That would have restored Complaint No. 1 to its August, 1993 status, when Judge Limbaugh permitted the initial dismissal.

Instead, the Trustee argued, and the bankruptcy court found, that it was not necessary for the Trustee to re-plead or prove these avoidance claims (on which the defendants had a right to a jury trial).

On appeal to the district court and to the Eighth Circuit, the Trustee did not contend that the dismissed avoidance claims had been refiled or determined by the bankruptcy court, but instead continued to argue that In re Just Brakes I did not require the Trustee to prove the claims for avoidance or to recover the trademark, or its proceeds, for the bankruptcy estate.

The bankruptcy court reinstated the same summary judgment without any findings (or pleaded claims) that the January 10, 1991 assignment of the trademark could be avoided as a fraudulent conveyance or as a preferential transfer to an insider, or for any other reason. The Trustee and the

bankruptcy court simply proceeded under their contention that In re Just Brakes I was wrong.

The district court reversed on the basis of the law of the case doctrine. (A-6-A-22). In In re Just Brakes II, the appellate panel determined the facts of the dismissed claim that the January 10, 1991 assignment constituted a voidable transfer to an insider. There had been no finding of these facts by the bankruptcy court or the district court. The appellate panel ruled that In re Just Brakes I determined that the Trustee could prove his (previously dismissed) avoidance claims without repleading them. Nothing in In re Just Brakes I so states, however, and the defendants did not mislead the bankruptcy court, the Trustee, or the district court on this issue since all parties and both courts believed, with justification, that the Trustee had previously dismissed these claims and was refusing to attempt to reinstate them. (A-25-26).

ARGUMENT

I. THE APPELLATE PANEL IMPROPERLY ACTED AS THE FACT-FINDER FOR A PREVIOUSLY DISMISSED CLAIM

It is undisputed that the Trustee dismissed all avoidance claims to defeat the defendants' jury demands which had been allowed by Judge Hamilton. In re Just Brakes I did not state that the dismissed claims had been reinstated, but merely stated that they must be determined before the bankruptcy court could return to the question of remedy. The Trustee argued, and the bankruptcy court ruled, that it was not necessary to determine (or reinstate) the dismissed avoidance claims. The bankruptcy court merely ruled that the Trustee **might have prevailed** if the avoidance claims had been heard.

(A-26). The Trustee's post-remand brief argued that the record established a *prima facie* case for avoidance of the January 10, 1991 assignment of the trademark as a preferential transfer to an insider (A-27), while simultaneously contending that it was not necessary for the Trustee to either plead or prove such claim. (JA-65). The Trustee simultaneously argued, in a telephone conference, that "if the avoidance action was necessary to show that these assets were part of the estate, the Eighth Circuit could not have found that there was a violation of the automatic stay." (JA-44, 45). That was disingenuous.

The defendants argued, in response, that In re Just Brakes I required resolution of the avoidance claims **before returning to the question of remedy** and that the avoidance claim had been intentionally dismissed, over objection, to avoid the defendants' jury trial demands. (JA-43, 44, 79, 80).

The appellate panel determined one of the dismissed avoidance claims, without findings of facts on this claim by the bankruptcy court or the district court. The Trustee had not raised this as an issue in either the appeal to the district court or the current appeal to the Eighth Circuit. **The issue was raised by the appellate panel, on its own motion, after oral argument.**

It is clear that courts of appeal are not to act as triers of fact, but are limited to determining whether the findings of fact of the trial court were clearly erroneous (which applies to bankruptcy court findings – but here there should have been a jury trial in the district court). Anderson v. City of Bessemer, 470 U.S. 564, 573-576 (1985). *See also*, Wegner v. Grunewaldt, 821 F.2d 1317 [10] (8th Cir. 1987):

> If the bankruptcy court's factual findings are silent or ambiguous as to an outcome determinative factual question, the district court

> may not engage in its own fact-finding but, instead, must remand the case to the bankruptcy court for the necessary factual determinations.

Here, the defendants were not even on notice that the appellate panel was engaging in a fact-finding process on the dismissed avoidance claim.

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714-15 (1986) holds:

> We think that the Court of Appeals was mistaken to engage in such factfinding. . . . it should not simply have made factual findings on it its own.. . .
>
> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'

II. THE APPELLATE PANEL IMPROPERLY, IMPLICITLY, DENIED THE DEFENDANTS' JURY DEMANDS, PREVIOUSLY ALLOWED BY THE DISTRICT COURT, ON THE TRUSTEE'S DISMISSED CLAIMS FOR AVOIDANCE

> Judge Hamilton allowed the defendants' jury demands for the Trustee's avoidance claims, **including the very claim the appellate panel subsequently determined**. Judge Limbaugh permitted the Trustee to eliminate his avoidance claims to avoid the jury demands. In re Just Brakes II states that these dismissed avoidance claims were somehow reinstated (without the knowledge of the parties, bankruptcy court or district court), then proceeded to determine one of the dismissed avoidance claims without recognizing the defendants' previously-granted right to a jury trial. This violated the defendants' previously determined Seventh Amendment right to a jury trial. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

See also, AG Services of Amer. v. Neilsen, 231 F.3d 726, 730 (10th Cir. 2000). The Seventh Amendment protects a party's right to a jury trial by ensuring that factual determinations made by a jury are not thereafter set aside by the court, except as permitted under common law.

III. THE APPELLATE PANEL DENIED THE DEFENDANTS' DUE PROCESS RIGHTS TO NOTICE AND AN OPPORTUNITY TO BE HEARD BY DETERMINING, AS THE FACT-FINDER, A CLAIM PREVIOUSLY DISMISSED BY THE TRUSTEE

The bankruptcy court concluded that the Trustee might have won the avoidance claims if he had litigated them. The

Trustee did not contend, either before the district court or the Eighth Circuit, that the dismissed claims for avoidance had actually been determined. The parties, bankruptcy court and district court believed that the Trustee had dismissed his claims for avoidance and was contending that it was not necessary to have them determined. In fact, that was the Trustee's position. The constitutional right of due process requires notice of a claim and an opportunity to be heard in opposition. "Judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated." Nelson v. Adams USA, Inc., 529 U.S. 460, 471 (2000). The defendants were unaware that the appellate panel was even considering acting as the fact-finder on one of the abandoned avoidance claims. Defendants were not afforded due process notice of the claim and an opportunity to defend.

IV. THE APPELLATE PANEL FAILED TO DETERMINE ALL FACTS NECESSARY TO SUPPORT ITS DETERMINATION THAT THE JANUARY 10, 1991 ASSIGNMENT OF THE TRADEMARK WAS A VOIDABLE PREFERENCE TO AN INSIDER

A voidable transfer to an insider within a year before the bankruptcy petition requires findings that Just Brakes (the debtor) was insolvent at the time of the transfer (January 10, 1991), that the transfer was not exchanged for new, fair value, that F.G.R. Management was an insider and that F.G.R. Management was a creditor of Just Brakes, among other facts. All these facts are disputed by the defendants, were not determined by either the bankruptcy court or the district court,

and in several instances were also not determined by the appellate panel. In re Chase & Sanborn Corp., 904 F.2d 588 [8], [18], [28], [35] (11th Cir. 1990).

V. THE APPELLATE PANEL IMPROPERLY ACTED AS A FACT-FINDING COURT OF EQUITY WITHOUT PROVIDING THE DEFENDANTS WITH AN OPPORTUNITY TO PRESENT FAVORABLE EVIDENCE

The appellate panel concluded that equity required placing the trademark sale proceeds in the bankruptcy estate for the benefit of all creditors. The primary creditors who filed claims, however (Francorp and F.G.R. Management), are parties which assisted Just Brakes in defrauding the defendants through the fraudulent franchise scheme. The defendants did not file claims in the bankruptcy court because to avoid waiving their rights to a jury trial. Consequently, the appellate panel has applied "equitable" principles to transfer the only asset of Just Brakes (which defrauded the defendants) from the defendants to the parties who assisted Just Brakes in the franchise fraud. A substantial portion of the proceeds will certainly also be used to pay the fees of the Trustee and the attorney for the Trustee (who are partners in the same law firm) even though the convoluted nature of these proceedings, and the two appeals, were caused by the maneuvering of the Trustee and his attorney to avoid the defendant's jury demands and to avoid any trial on the merits. *See,* A-28. It is well established that "equity usually follows the law". Transit Casualty Co. v. Selective Ins. Co., 137 F.3d 540 [25] (8th Cir. 1998). Equitable principles may not be used to override principles of law.

The Trustee and the bankruptcy court blatantly disregarded the law of the case by requesting and reissuing a

judgment for money damages (the remedy) without first determining the avoidance claims, as directed by In re Just Brakes I. Equitable principles do not permit the appellate panel to determine the facts of the trustee's previously dismissed avoidance claim, in violation of the defendants' previously granted jury demands on that claim. Equitable principles do not permit the appellate panel to determine that the previously dismissed avoidance claim does need not be refiled and is not barred by the statute of limitations, where established precedent holds otherwise.

If presented with the opportunity, the defendants would offer evidence to support their contentions that "equity" favors affirmance of the district court judgment.

VI. THE APPELLATE PANEL VIOLATED THE LAW OF THE CASE DOCTRINE BECAUSE IN RE JUST BRAKES I PERMITTED THE BANKRUPTCY COURT TO RETURN TO THE QUESTION OF REMEDY ONLY AFTER RESOLVING THE AVOIDANCE CLAIMS, SOMETHING THE BANKRUPTCY COURT NEVER DID

The appellate panel has rewarded the Trustee and the bankruptcy court for their blatant disregard of the law of the case. This will simply encourage others to do the same. Under the law of the case doctrine, the lower court's actions, after remand, should not be inconsistent with either the letter or the spirit of the mandate. The Trustee and the bankruptcy court returned to the question of remedy without first determining the avoidance claims, after taking positions clearly contrary to In re Just Brakes I. When a case has been decided by the Eighth Circuit and remanded, every question which was before the court and disposed of by its decree is finally settled and determined. The lower courts may not alter

that ruling. The law of the case doctrine prevents relitigation of settled issues to (1) **ensure uniformity of decisions**, (2) **protect the expectations of the parties**, and (3) **promote judicial economy**. Klein v. Arcoma Products Co., 73 F.3d 779, 784 (8th Cir. 1986).

The bankruptcy court ignored the requirement that it determine the avoidance issues before returning to the question of remedy. The appellate panel has rewarded that violation of the law of the case by substituting its own fact-findings on a dismissed claim, as a substitute for the bankruptcy court's failure to make such finding. Of course, once the avoidance issues were raised, after oral argument in the Eighth Circuit, the defendants' previously-granted jury demands should have applied.

VII. THE APPELLATE PANEL IMPROPERLY DETERMINED, AS THE FACT-FINDER, THE TRUSTEE'S DISMISSED AVOIDANCE CLAIM AFTER IT WAS BARRED BY THE STATUTE OF LIMITATIONS

The appellate panel made no findings of fact, or law, as to why the statute of limitations does not apply to the previously dismissed (and never refiled) claims for avoidance. The district court found that the claims for avoidance were time barred (since the Trustee made no effort to reinstate them even after the remand). (A-20). The bankruptcy court made no findings on the statute of limitations issue because it determined that it was not necessary to decide any of the avoidance claims. The appellate panel fails to explain how the district court erred in concluding that the Trustee's dismissed claims for avoidance were barred by the statute of limitations, as expressed in McCuskey, Trustee v. Central Trailer Services,

Ltd., 37 F.3d 1329, 1330 (8th Cir. 1994). *See,* the district court's analysis at A-20.

CONCLUSION

For the foregoing reasons, the Defendants-Appellees hereby pray that this court grant them a rehearing and/or a rehearing en banc on each of the above described issues.

DAVID M. DUREE
David M. Duree & Associates, P.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2852

David A. Sosne, Trustee,	x	
	x	
Appellant,	x	Order Denying
	x	Petition for
vs.	x	Rehearing and for
	x	Rehearing En Banc
Reinert & Duree, P.C.,	x	
et al.,	x	
	x	
Appellees.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

July 15, 2002

Ordered Entered at the Direction of the Courts

Clerk, U.S. Court of Appeals, Eighth Circuit

(12-80)

U.S. DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

November 20, 1992
(date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of a Document recorded February 4, 1991.

* * *

By authority of the
COMMISSIONER OF PATENTS
AND TRADEMARKS
(signature appears to read
"Norma Jean Woodson")
Certifying Officer

(Stamp reads" (8-405D)
"Mail Room 56, Feb. 4, 1991
Pat. & Trademark Off.")

On Letterhead of "Haverstock, Garrett and Roberts"
Attorneys at Law
Patents and Trademarks
611 Olive Street
St. Louis, Missouri 63101

February 1, 1991

(stamp reads: RECEIVED
91 FEB 11 AM 8:01
ASSIGNMENT BRANCH)

Hon. Commissioner of Patents
and Trademarks
Washington, D.C. 20231

(Stamp reads: REEL 0768 FRAME 050
TRADE-MARK)

Dear Sir:

We enclose herewith assignment from Just Brakes Corporate Systems, Inc. to FGR Management, Inc. of the entire interest in their U.S. Trademark Registration No. 1,309,354 for the mark JUST BRAKES.

Please record this assignment. Enclosed is our check for $8.00 to cover the recording fee.

If any additional charges are due on this assignment charge Account No. 08-1280.

Very truly yours,

HAVERSTOCK, GARRETT &
ROBERTS

(signature)
Samuel Digirolano

SD:jn
Encl.

(89101555)

120 EL 02/08/91 1309354 0 405 8.00 CK

ASSIGNMENT OF REGISTRATION OF A MARK

WHEREAS, Just Brakes Corporate Systems, Inc. of 10411 Clayton Road, St. Louis, Missouri 63131 has adopted, used and is using a mark which is registered in the United States Patent and Trademark Office, Registration No. 1,309,354 dated December 11, 1984; and

WHEREAS, FGR Management, Inc. of 11906 Manchester Road, Suite 211, St. Louis, Missouri 63131 is desirous of acquiring said mark and the registration thereof;

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, said Just Brakes Corporate Systems, Inc. does hereby assign unto said FGR Management, Inc. all right, title and interest in and to the said mark, together with the good will of the business symbolized by the mark, and the above-identified registration thereof.

JUST BRAKES CORPORATE SYSTEMS, INC.
By: (signature)
Daniel J. Archambault
President

ATTEST:
(signature)
Lora Roberts
Secretary

(Stamp reads:
REEL 0768 FRAME 051
TRADE-MARK)

STATE OF MISSOURI)
)
COUNTY OF ST. LOUIS)

On this tenth day of January, 1991, before me appeared Daniel J. Archambault, the person who signed this instrument, who being by me duly sworn, did say that he is the President

of Just Brakes Corporate Systems, Inc., a corporation of the State of Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was siganed [sic] and sealed in behalf of said corporation, by authority of its Board of Directors; and said DANIEL J. ARCHAMBAULT, acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal in the County and State the day and year first above written.

(signature appears to read: Debora Levisone)
Notary Public

My term expires: 7-13-94
(notary seal affixed thereto)

(Stamp reads:
REEL 0768 FRAME 52
TRADE-MARK)

RECORDED
PATENT AND TRADEMARK
OFFICE
FEB – 4 1991

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RECEIVED & FILED
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Clerk, US BANKRUPTCY CT
EASTERN DISTRICT
ST. LOUIS, MISSOURI

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	Case No. 91-46618-172
	Chapter 7
Debtor.	
	Adversary No. 92-4473
DAVID A SOSNE, Trustee,	
Plaintiff,	
v.	
F.G.R. MANAGEMENT, INC., and GARY ROBBINS, and WILLIAM G. FREEBERSYSER and CAROLE L. FREEBERSYSER and RICHARD ESTES and GLEN ESTES and JAMES C. LANDES,	
Defendants.	

ADVERSARY COMPLAINT

COMES NOW David A. Sosne, duly appointed Chapter 7 Trustee, by and through his attorneys and for his Adversary Complaint to avoid preferential transfers, to avoid fraudulent conveyance, and for declaratory relief pursuant to 11 USC §§ 547, 548, 550 and 363 and Federal Rule of Bankruptcy Procedure 7001, respectfully states to this Honorable Court as follows:

COUNT I

1. This Court has jurisdiction over this adversary proceeding pursuant to 28 USC §§151, 157 and 1334, and Local Rule 29 of the United States District Court for the Eastern District of Missouri,

2. This is a "core" proceeding pursuant to 28 USC §157(a)(2)(E), (F), (H), (K) and (O), which the Court may hear and determine.

3. On October 15, 1991, at approximately 9:12 a.m., Debtor filed its Petition for Protection under Chapter 7, Title 11, United States Code.

4. On or about January 10, 1991, Debtor purportedly assigned all right, title and interest in and to a mark registered in the United States Patent and Trademark Office, Registration No. 1,309,354, dated December 11, 1984, to F.G.R. Management, Inc. ("F.G.R.") in exchange for F.G.R.'s assumption of certain pre-existing debts of the Debtor. The assignment was filed by F.G.R. with the United States Patent and Trademark Office on February 4, 1991.

5. Trustee alleges that F.G.R.'s president, Darrell D. Dunn, is a shareholder and director of Debtor.

6. Trustee alleges that the transfer of Debtor's interest in the registered mark was made within one year of the date of filing of its Petition for protection under Chapter 7 of the Bankruptcy Code and as such constitutes a fraudulent conveyance within the meaning of 11 USC §548 in that the Debtor received less than reasonably equivalent value in exchange for such transfer and said transfer left the business with an unreasonably small capital as the mark constituted virtually the sole asset of the Debtor.

7. Trustee further alleges that he may recover from Defendants the transferred property or its proceeds pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court enter an Order (a) declaring that the afore-mentioned transfer was a fraudulent conveyance to Defendant F.G.R. within the meaning of 11 USC §548; (b) voiding the registration by Defendant F.G.R. Management, Inc. of the Assignment of Mark Registration No. 1,309,354 with the United States Patent and Trademark Office; and (c) granting such other and further relief as the Court may deem just and proper including the taxing of costs and attorney's fees against Defendant F.G.R.

COUNT II – PREFERENTIAL TRANSFER

COMES NOW Plaintiff and realleges paragraphs 1 and 7 of Count I above as though fully set forth herein.

1. The transfer of said registered mark to F.G.R. constitutes a preference within the meaning of 11 USC §547 as it was a transfer for the benefit of Defendant F.G.R. for or on account of an antecedent debt owed by Debtor before such transfer was made; such transfer was to an insider as that term is defined under 11 USC §101(31), was made within one year prior to the filing of the Petition, and enabled the Defendant to receive more than such creditor would have received in the bankruptcy case had the transfer not been made.

2. The Trustee may recover from Defendant F.G.R. the transferred mark or its proceeds pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court (a) declare that the above-described transfer was a preferential transfer to Defendant F.G.R. within the meaning of 11 USC §547; (b) enter a judgment in favor of Plaintiff and against Defendant F.G.R. Management, Inc. for the recovery of the mark or its proceeds, together with interest from the date of demand; and (c) order such other and further relief as the Court may deem just and proper including the taxing of costs against Defendant F.G.R.

COUNT III – DECLARATORY RELIEF

COMES NOW Plaintiff and realleges paragraphs 1 and 7 of Count I above and paragraphs 1 and 2 of Count II above as though fully set forth herein.

1. On October 15, 1991, at approximately 10:00 a.m., and immediately following Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to an Order of the Circuit Court of the County of St. Louis, State of Missouri, in Cause No. 619506, dated September 30, 1991, by the Sheriff of St. Louis County, State of Missouri, which sale purported to transfer the above-described service mark bearing U.S. Service Registration Mark No. 1,309,354 to the highest bidder, Just Brakes Corporation, for the sum of One Hundred Five Thousand Dollars ($105,000.00).

2. The transfer of said Service Mark constitutes a post-petition transaction by Defendants Robbins, William Freebersyser, Carole Freebersyser, Richard Estes, Glen Estes and James C. Landes subject to avoidance by the Trustee as it was a transfer that occurred after the commencement of the case that was not authorized under the Code nor by Order of this Court.

3. The Trustee may avoid said transfer pursuant to 11 USC §549 and recover the property transferred or the value of such property pursuant to 11 USC §550 or, in the alternative, may seek an Order authorizing the adoption and incorporation of said transfer pursuant to 11 USC §363(b)(1).

WHEREFORE, Trustee prays this Honorable Court enter an Order pursuant to 11 USC §363(b)(1) permitting Trustee to adopt and incorporate the sale of personal property of the estate described as the service mark, trade mark and trade name "Just Brakes" and the associated good will, and all other assets of Just Brakes Corporate Systems, Inc., including the service mark registration bearing U.S. Service Mark

Registration No. 1,309,354 issued on or about December 11, 1984, for the mark "Just Brakes", to Just Brakes Corporation, 1931 Market Center Blvd, Dallas Texas 75207, for the sum of One Hundred Five Thousand Dollars ($105,000.00) and for such other and further relief as the Court may deem just and proper in the premises.

Respectfully submitted,
SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By (signature)
EDWARD J. MILLER, JR.
Attorney for Trustee
8909 Ladue Road
St. Louis MO 63124
(314) 991-4999

Dated: 10/13/92
G:18743

RM B6-Cont.

Stamp: Received & filed
Oct 30 4 02 PM '91
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United States Bankruptcy Court

District of

In re Just Brakes Corporate Systems, Inc.,
Debtor

Case No. 91-46618 (172)

SUMMARY OF SCHEDULES

Total Assets: $75,697.76

United States Bankruptcy Court
District of
In re Just Brakes Corporate Systems, Inc.,
Debtor

Case No. 91-46618 (172)

SCHEDULE B – PERSONAL PROPERTY

Description and Location of Property	Current Market Value of Debtor's Interest in Property, w/o Deducting any Secured Claim or Exemption
Property Type 2 (checking, etc.)	
Heritage National Bank 10900 Manchester Kirkwood, Missouri 63122	$101.64
Marine Bank of Springfield East Old State Capitol Plaza Springfield, IL 62701`	$296.12 (Account Close
* * *	
Property Type 21 (Patents, etc.)	
Registered Trademark – Just Brakes	$75,000.00*

* Due to disputes over valuation and ownership, current, true fair market value will probably need to be determined by the court.

Property Type 26 (Office equip., etc.)	
Facsimile Machine	$300.00
Total	$75,697.76

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: JUST BRAKES CORPORATE SYSTEMS, INC., Debtor.	)	U.S. Bankruptcy Case No. 91-46618-172
DAVID A SOSNE, Trustee, Plaintiff,	)	United States Bankruptcy Adversary No. 92-4384 U.S. District Court Cause No. 4:92CV2297 SNL
v.	)	
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & CRANE, P.C., et al., Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on several pending motions regarding this Court's exercise of jurisdiction of this case. Currently pending before the Court are the defendants' motion to withdraw the reference (#5-1), filed November 16, 1992 and motion for summary judgment (#11-1), filed April 20, 1993; and the plaintiff Trustee's motions to consolidate (#6-1 and #8-1), filed November 16 and December 11, 1992 respectively, and motion to remand (#15), filed April 23, 1993. This memorandum and order will only address the motion to withdraw the reference, the motions to consolidate, and the motion to remand.

On or about September 18, 1992 plaintiff Trustee filed an adversary complaint in the bankruptcy court seeking recovery for violations of the United States Bankruptcy Code, Sections 549 and 550 (preferential transfer of the Debtor's property) and for violations of the automatic stay provisions of Section 362. This complaint shall be referred to as Complaint 1.

On or about October 13, 1992 plaintiff Trustee filed a companion adversary complaint in the bankruptcy court against several of the named defendants in Complaint 1, plus additional named defendants. This complaint also alleged violations of the United States Bankruptcy Code through act(s) of fraudulent conveyance and preferential transfer. This complaint shall be referred to as Complaint 2.

On or about October 22, 1992 the defendants in both complaints filed a jury demand and motions to withdraw the reference. On or about October 30, 1992 both complaints and their respective motions were transferred to the district court. Complaint 1 and its motions were assigned to the undersigned as Cause No. 92CV2297; Complaint 2 was assigned to Judge Jean C. Hamilton as Cause No. 92CV2298.

On February 5, 1993 Judge Hamilton granted the defendants' motion to withdraw the reference. She determined that the defendants have a right to trial by jury based on the fraudulent conveyance and preferential transfer claims in Complaint 2. Since bankruptcy courts have no statutory authorization to conduct jury trials, the withdrawal of the reference was proper. *See,* Order of Judge Jean C. Hamilton, filed February 5, 1993, Cause No. 4:92CV2298.

Meanwhile, with regard to Complaint 1 in this Court, the defendants' motion to withdraw the reference and the plaintiff Trustee's motions to consolidate were still pending. Plaintiff Trustee then received leave to file an amended

adversary complaint (Complaint 1A) deleting all the claims duplicative of Complaint 2. Complaint 1A seeks damages for recovery of violation of the automatic stay only.

The plaintiff Trustee has filed a motion to remand seeking to transfer this action back to the bankruptcy court for disposition. He avers that although actions for violations of the automatic stay are core proceedings, they are not the type of core proceeding which are subject to the Seventh Amendment right to a jury trial. He contends that the instant action does not involve either state created rights nor rights protectable at common law, therefore the defendants are not constitutionally entitled to a jury trial. The defendants, on the other hand, contend that in order for the Trustee to pursue his claim for violation of the automatic stay, he must first establish that the Debtor had a protected interest in the subject property (trademark) prior to the date the bankruptcy petition as filed (October 15, 1991). They further contend that although the amended adversary complaint eliminates the claim that the January 10, 1991 assignment of the subject trademark by the Debtor was a voidable preference, this issue must first be resolved before the issue of the alleged violation of the automatic stay can be addressed. They argue that they are entitled to have the issue of the voidable preference tried in the district court by a jury.

The amended adversary complaint that presently stands before this Court states only a claim for violation of the automatic stay. Actions for violations of the automatic stay, while core proceedings, do not entitle the participants to a jury trial. Historically, core proceedings which involve state created rights or rights created by common law have invoked the Seventh Amendment right to trial by jury. Granfinaciera, S.A. v. Nordberg, 492 U.S. 33 (1989). However, an action for violation of the automatic stay involves only federal rights

created under the bankruptcy code, therefore there is no constitutional entitlement to a jury trial. Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986).

As for the defendants' concerns regarding the issue of a voidable preference being tried first in the district court by a jury, the Court finds no conflict. Presently pending before Judge Hamilton is a similar complaint which presents claims of fraudulent conveyance and preferential transfer. The defendants will get their opportunity to have these claims tried before a jury. Whether these claims will be resolved prior to any hearing on the complaint regarding the alleged violation of the automatic stay is perhaps something to be worked out among the parties, Judge Hamilton, and the bankruptcy court.

The plaintiff Trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this. By eliminating one of his claims, the action becomes a summary proceeding which significantly involves the administration of the Bankruptcy Code, a matter best left to the bankruptcy court to adjudicate.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motion to withdraw the reference (#5-1) be and is **DENIED.**

IT IS FURTHER ORDERED that the plaintiff Trustee's motions to consolidate (#6-1 and 8-1) be and are **DENIED.**

IT IS FINALLY ORDERED that the plaintiff Trustee's motion to remand (#15-1) be and is **GRANTED.** This cause of action, along with any remaining motions, shall be remanded to the United States Bankruptcy Court, Eastern

District of Missouri, Eastern Division pursuant to 28 U.S.C. §1452(b).

Dated this 24th day of August, 1993.

(Stephen N. Limbaugh)
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RECEIVED & FILED
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CLERK, US BANKRUPTCY CT
EASTERN DISTRICT
ST. LOUIS, MISSOURI

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	United States Bankruptcy Adversary No. 92-4384
DAVID A SOSNE, Trustee,	United States District Court No. 4:92CV2297SNL
Plaintiff,	
v.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	
Defendants.	

AMENDED ADVERSARY COMPLAINT TO ENFORCE STAY AND ASSESS DAMAGES FOR WILLFUL VIOLATION OF STAY

COMES NOW David A. Sosne, Trustee, by and through his attorneys, and for his Complaint for an Order to enforce the automatic stay and assess damages for the willful violation of stay pursuant to 11 U.S.C. §§362(a) and 362(h) against Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., Gary Robbins, Robbins & Associates, Inc., Estes &

Estes, Inc., and James Landes ("Defendants"), respectfully states to this Honorable Court as follows:

1. On October 15, 1991, at approximately 9:12 a.m., the Debtor filed its Voluntary Petition for relief under Title 11, Chapter 7 of the United States Code.

2. The Bankruptcy Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§151, 157 and 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri.

3. This proceeding is a "core" proceeding within the meaning of §157(b)(2)(G) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, which the Court may hear and determine.

4. Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., is a professional corporation duly formed and existing pursuant to the laws of the State of Missouri.

5. Defendant Gary Robbins is a citizen and a resident of the State of Missouri.

6. Defendant Robbins & Associates, Inc. is a corporation administratively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustee William G. freebersyser [sic] and Carole Lee Freebersyser.

7. Defendant Estes & Estes is a corporation administratively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustees Richard Estes and Glen Estes.

8. Defendant James Landes is a citizen and resident of the State of Missouri.

9. On September 28, 1988, Defendants, represented by Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., recovered a judgment against

the Debtor in the Circuit Court for this County of St. Louis, in Cause No. 542798 in the principal sum of $133,083.33.

10. On or about January 23, 1991, Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James Landes, by and through their attorneys Reinert & Duree, P.C. (collectively the "Defendants") filed suit in the Circuit Court for the County of St. Louis, State of Missouri, in Cause No. 619506 seeking, among other things, an order enjoining a certain trademark transfer from Debtor to F.G.R. Management, Inc., a Missouri corporation, and Defendants obtained on January 23, 1991, an order restraining the Debtor from transferring the property.

11. On or about July 16, 1991, Defendants obtained, by default, a permanent injunction against the Debtor and others, barring them from transferring or assigning the trademark and procured an order directing that the trademark be sold by the St. Louis County Sheriff.

12. By Order issued September 30, 1991, in Case No. 619506, the Circuit Court for St. Louis County, State of Missouri, directed the Sheriff of St. Louis County, State of Missouri, to levy upon, seize and take as property of Defendants certain personal property of the Debtor which included the service mark, trademark and trade name "Just Brakes" and the associated good will and all other assets of Just Brakes Corporate Systems, Inc., including the service mark registration bearing U.S. Service mark Registration No. 1,309,354. The Court further ordered said personal property of Debtor be sold to satisfy the judgments of Defendants Gary Robbins, individually, James Landes, individually, Richard Estes and Glen Estes as statutory Trustees of Estes & Estes, Inc. and William G. Freebersyser and Carol Lee Freebersyser as Statutory Trustees of Robbins & Associates, Inc., entered

on September 28, 1988, in Cause No. 542798 in St. Louis County Circuit Court.

14. On October 15, 1991, at approximately 10:00 a.m. and immediately following the Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to said order of the Circuit Court of the County of St. Louis, State of Missouri, in Cause No. 619506, dated September 30, 1991, by the Sheriff of St. Louis County, State of Missouri, which sale purported to transfer the above-described service mark to the highest bidder, which sale of said personal property garnered the sum of One Hundred Five Thousand Dollars ($105,000.00).

15. Trustee alleges that Defendants had actual knowledge of the filing of the bankruptcy petition and willfully and intentionally continued their efforts to collect a judgment.

16. Immediately before the Sheriff's sale, attorney for F.G.R. Management, Inc., a party to the State Court proceedings referred to herein, objected to the continuation of said sale and informed Defendants, the Sheriff and the Circuit Court of the County of St. Louis, of the bankruptcy filing by Debtor.

17. By Order entered October 15, 1991, in Cause No. 61956, the Circuit Court permitted to sale to continue and further directed Defendants to hold the funds in escrow "until the Debtor and others exhausted their legal remedies contesting the validity of the October 15, 1991 sale, or until further order of Court."

18. On or about October 14, 1991, Defendants obtained an Order in Cause No. 542798 which directed the Clerk of the Circuit Court, St. Louis county, Missouri, to pay-out those sums received at the above-described Sheriff's sale; Trustee alleges that the Clerk made payment to "Gary Robbins

and Reinert & Duree, Plaintiff's attorneys" in the sum of One Hundred Thousand Seven Hundred Seventeen Dollars ($100,717.00) on or about October 24, 1991.

19. This action of Defendants was in willful violation of the automatic stay, U.S.C. §362(a)(2), (3), (4), 95) [sic] and (6) and Plaintiff is entitled to damages, costs and attorneys fees.

WHEREFORE, Trustee prays this Honorable Court enter an Order (1) finding that the acts of Defendants constitute a willful violation of the automatic stay as defined under 11 U.S.C. §362(a); (2) assessing actual damages in the amount of One Hundred Five Thousand Dollars ($105,000.00) and including, but not limited to, interest from October 15, 1991, costs and attorneys fees incurred by Trustee in this action to enforce stay, and punitive damages, all as provided under 11 U.S.C. §362(h), and (3) for such other and further relief as this Court deems just and proper.

Dated: 4/2/93

Respectfully submitted,
SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By (signature)
Steven M. Hamburg

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RECEIVED & FILED
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CLERK, US BANKRUPTCY CT
EASTERN DISTRICT
ST. LOUIS, MISSOURI

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	United States Bankruptcy Adversary No. 92-4384
DAVID A SOSNE, Trustee,	United States District Court No. 4:92CV2297SNL
Plaintiff,	
v.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	
Defendants.	

MOTION FOR LEAVE TO FILE AMENDED ADVERSARY COMPLAINT

COMES NOW the Plaintiff and for his Motion states:

1. On September 18, 1992, Plaintiff filed his Adversary Complaint seeking recovery for violation of the automatic stay of 11 U.S.C. Section 362(a).

2. On October 22, 1992, Defendants filed their Jury Demand, a Motion to Withdraw Reference to the Bankruptcy Court and Answer.

3. On October 30, 1992, the Honorable James J. Barta, pursuant to Rule 5011 of the Federal Rules of Bankruptcy Procedure, transferred to the United States District Court Defendants' Motion for Withdrawal of Reference and Defendants' Demand for a Jury Trial as well as the Plaintiff's Motion to Consolidate to which the Defendants objected.

4. The case into which the Plaintiff sought to consolidate this proceeding was one filed subsequently, on October 13, 1992, against the same Defendants plus another party (Cause No. 4:92CV2298JCH. It seeks recovery under, inter alia, 11 U.S.C. Section 549 and Section 550.

5. The Amended Complaint filed herewith eliminates reference to recoveries under 11 U.S.C. Section 549 and 550 which were duplicative of the Request for Relief in Case No. 4:92CV2298JCH.

6. The Amended Complaint only seeks damages for recovery of violations of the automatic stay.

WHEREFORE, Trustee prays leave to file the Amended Complaint.

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By (signature)
Steven M. Hamburg

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RECEIVED & FILED
Sep 16, 1992
CLERK, US BANKRUPTCY CT
EASTERN DISTRICT
ST. LOUIS, MISSOURI

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	(in handwriting) 46618 Case No. 91-~~46835~~-172
Debtor.	Chapter 7 Adversary No. 92-4384
DAVID A SOSNE, Trustee,	4:92CV2297SNL
Plaintiff,	
v.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., and GARY ROBBINS and ROBBINS & ASSOCIATES, INC., and ESTES & ESTES, INC. and JAMES C. LANDES,	
Defendants.	

ADVERSARY COMPLAINT TO ENFORCE STAY AND ASSESS DAMAGES FOR WILLFUL VIOLATION OF STAY OR, IN THE ALTERNATIVE, COMPLAINT TO COMPEL TURN OVER

COMES NOW David A. Sosne, Trustee, by and through his attorneys, and for his Complaint for an Order to

enforce the automatic stay and assess damages for the willful violation of stay pursuant to 11 U.S.C. §§362(a) and 362(h) against Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc., and James Landes ("Defendants"), or, in the alternative, for his Complaint to Compel Turn Over of property of the estate pursuant to 11 USC §§549 and 550 directed to Defendants, respectfully states to this Honorable Court as follows:

1. On October 15, 1991, at approximately 9:12 a.m., the Debtor filed its Voluntary Petition for relief under Title 11, Chapter 7 of the United States Code.

2. This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri.

3. This proceeding is a "core" proceeding within the meaning of § 157 (b)(2)(E) and §157(b)(2)(G) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, which the Court may hear and determine.

4. Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., is a professional corporation duly formed and existing pursuant to the laws of the State of Missouri.

5. Defendant Gary Robbins is a citizen and a resident of the State of Missouri.

6. Defendant Robbins & Associates, Inc. is a corporation administratively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustee William G. Freebersyser and Carol Lee Freebersyser.

7. Defendant Estes & Estes is a corporation administratively dissolved by the Secretary of State, State of

Missouri, and pursuant to Missouri law, is represented by Statutory Trustees Richard Estes and Glen Estes.

8. Defendant James Landes is a citizen and resident of the State of Missouri.

9. On or about January 23, 1991, Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James Landes, by and through their attorneys Reinert & Duree, P.C. (collectively the "Defendants") filed suit in the Circuit Court for the County of St. Louis, State of Missouri, in Cause No. 619506 seeking, among other things, an order enjoining a certain trademark transfer from Debtor to F.G.R. Management, Inc., a Missouri corporation.

10. On or about July 16, 1991, Defendants obtained, by default, a permanent injunction against the Debtor and others, barring them from transferring or assigning the trademark and procured an order directing that the trademark be sold by the St. Louis County Sheriff.

11. By Order issued September 30, 1991, in Case No. 619506, the Circuit Court for St. Louis County, State of Missouri, directed the Sheriff of St. Louis County, State of Missouri, to levy upon, seize and take as property of Defendants certain personal property of the Debtor which included the service mark, trademark and trade name "Just Brakes" and the associated good will and all other assets of Just Brakes Corporate Systems, Inc., including the service mark registration bearing U.S. Service mark Registration No. 1,309,354. The Court further ordered said personal property of Debtor be sold to satisfy the judgments of Defendants Gary Robbins, individually, James Landes, individually, Richard Estes and Glen Estes as statutory Trustees of Estes & Estes, Inc. and William G. Freebersyser and Carol Lee Freebersyser as Statutory Trustees of Robbins & Associates, Inc., entered

on September 28, 1988, in Cause No. 542798 in St. Louis County Circuit Court.

12. Trustee alleges that at the time the Debtor filed its Petition, Defendants possessed a voidable interest in Service Mark Registration No. 1,309,354 in that the above-described proceedings constituted a preferential transfer within the meaning of 11 USC §547 because it was a transfer for the benefit of Defendants for or on account of an antecedent debt owed by the Debtor before such transfer was made, was made within ninety (90) days before the filing of the bankruptcy Petition, and enabled the Defendants to receive more than such creditors would have received in the bankruptcy case had the transfer not been made.

13. On October 15, 1991, at approximately 10:00 a.m. and immediately following the Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to said order of the Circuit Court of the County of St. Louis, State of Missouri, in Cause No. 619506, dated September 30, 1991, by the Sheriff of St. Louis County, State of Missouri, which sale purported to transfer the above-described service mark to the highest bidder, which sale of said personal property garnered the sum of One Hundred Five Thousand Dollars ($105,000.00).

14. Trustee alleges that Defendants had actual knowledge of the filing of the bankruptcy petition and willfully and intentionally continued their efforts to collect a judgment.

15. Immediately before the Sheriff's sale, attorney for F.G.R. Management, Inc., a party to the State Court proceedings referred to herein, objected to the continuation of said sale and informed Defendants, the Sheriff and the Circuit Court of the County of St. Louis, of the bankruptcy filing by Debtor.

16. By Order entered October 15, 1991, in Cause No. 619506, the Circuit Court permitted to sale to continue and further directed Defendants to hold the funds in escrow pending further order of the Circuit Court.

17. On or about October 24, 1991, Defendants obtained an Order in Cause No. 542798 which directed the Clerk of the Circuit Court, St. Louis County, Missouri, to pay-out those sums received at the above-described Sheriff's sale; Trustee alleges that the Clerk made payment to "Gary Robbins and Reinert & Duree, Plaintiff's attorneys" in the sum of One Hundred Thousand Seven Hundred Seventeen Dollars ($100,717.00) on or about October 24, 1991.

18. Trustee alleges that the application of said estate property in satisfaction of a pre-petition voidable transfer constitutes a violation of the automatic stay, 11 USC §362(a), entitling Trustee to damages, including, but not limited to, actual damages, costs and attorneys fees incurred by him in this action to enforce stay, and punitive damages, all as provided pursuant to 11 USC §362(h).

19. In the alternative, Trustee alleges that the post-petition application of estate property in satisfaction of a voidable preferential transfer constitutes a transaction subject to avoidance pursuant to 11 USC §549, and further alleges that he is entitled to recover those sums so applied pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court enter an Order (1) finding that the acts of Defendants constitute a willful violation of the automatic stay as defined under 11 U.S.C. §362(a); (2) assessing actual damages in the amount of One Hundred Five Thousand Dollars ($105,000.00) and including, but not limited to, interest from October 15, 1991, costs and attorneys fees incurred by Trustee in this action to enforce stay, and punitive damages, all as provided

under 11 U.S.C. §362(h), (3) in the alternative, Trustee prays this Court enter an Order avoiding the post-petition transfer of estate property; (4) enter a judgment in favor of Trustee in the amount of One Hundred Five Thousand Dollars ($105,000.00) pursuant to 11 USC §550; (5) and for such other and further relief as this Court deems just and proper.

Respectfully submitted,
SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By (signature)
Steven M. Hamburg

Dated: September 17, 1992

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2078 EMSL		
In Re: Just Brakes	*	"Filed
Corporate Systems, Inc.,	*	March 13, 1997
Debtor.	*	U.S. District Court
----------	*	E. Dist. of Mo.
David A. Sosne, Trustee,	*	St. Louis"
	*	Appeal from the
Appellee,	*	United States District
	*	Court for the
vs.	*	Eastern District of
	*	Missouri
Reinert & Duree, P.C, ; Gary	*	
Robbins; Robbins &	*	
Associates, Inc., Estes &	*	
Estes, Inc.; James C. Landes,	*	
	*	
Appellants.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

March 13, 1997

A true copy.
ATTEST: Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

"FILED
FEB 14 1995
U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS"

IN RE: JUST BRAKES CORPORATE SYSTEMS, INC., Debtor.	Bkcy Case 91-46618-172 Chapter 7 Adversary No. 92-4473
DAVID A SOSNE, Trustee, Plaintiff, v. F.G.R. MANAGEMENT, INC., et al., Defendants.	Cause No.4:92CV002298JCH Handwritten note reads: "Granted in interests of justice over objection of defendant Robbins. Catherine D. Perry 2/14/95 Case dismissed without prejudice"

MOTION TO DISMISS

COMES NOW David A. Sosne, the duly appointed Chapter 7 Trustee and Plaintiff herein ("Plaintiff"), by and through his counsel, and hereby moves to dismiss the above-referenced proceeding for the following reasons:

1. On September 18, 1992, Plaintiff commenced Adversary Proceeding No. 92-4384 with

the United States Bankruptcy Court seeking to enforce the automatic stay and other relief.

2. On October 13, 1992, the Trustee filed the above-referenced adversary proceeding with the United States Bankruptcy Court.

3. On November 30, 1994, the United States Bankruptcy Court issued its Order granting the Plaintiff's Motion for Summary Judgment filed in Adversary Proceeding No. 92-4384 and awarded Judgment to the Plaintiff and against the Defendants in the amount of One Hundred Thousand Seven Hundred Seventeen Dollars ($100,717.00).

4. Since the relief sought is similar in each of the two adversary proceedings, the Plaintiff desires to dismiss the above-referenced case, without prejudice, to refile the same at a later date should it become necessary.

WHEREFORE, the Plaintiff prays that this Court enter an Order dismissing the subject action, without prejudice.

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation
By: (signature)
Steven M. Hamburg

ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	*	
	*	
JUST BRAKES CORPORATE SYSTEMS, INC.,	*	Case No. 91-46618-172
	*	Chapter 7
	*	St. Louis, Missouri
Debtor.	*	July 20, 1998
	*	2:00 o'clock P.M.
DAVID A SOSNE, Trustee,	*	
	*	AP No. 92-4384-172
Plaintiff,	*	
v.	*	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	*	
	*	
Defendants.	*	

* * * * * * * * * * * * * * * *

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE JAMES J. BARTA

APPEARANCES:

For the Plaintiff:	STEVEN M. HAMBURG, ESQ. 8909 Ladue Road St. Louis, Missouri 63124
For the Defendants:	DAVID DUREE, ESQ. 812 North Collins St. Louis, Missouri 63102
Audio Operator:	TINA RADOSEVICH

FRED WILLMAN – ELECTRONIC LAW REPORTING
15 Persimmon Lane, Eureka, Missouri 63025
(314) 938-6631

PROCEEDINGS

THE COURT: We're on the record here with the status conference in the matter of the remand in the Trustee vs. Reinert & Duree matter. Gentlemen, just by way of introduction let me indicate the matter is back here on remand and principally the 8th Circuit affirmed the adversary proceeding about the violations of the automatic stay, but reversed the award of damages in part because the value of the trademark is not an appropriate compensatory remedy. So it is back here from the 8th Circuit and then the District Court sent it back to indicate that we should proceed consistent with the findings and orders of the 8th Circuit. So I will ask Mr. Hamburg first, please, sir, if you would, as the plaintiff's attorney, if there is any agreement that you and Mr. Duree might have as to the procedure for this remaining issues in the case?

MR. HAMBURG: David and I have reached no agreement with respect to going forward from this point.

THE COURT: All right, then. Let me make a suggestion to you. I don't want to take up a lot of either of your time this afternoon. Let me make a suggestion to you. I have reviewed what I think is everything in our adversary proceeding file. I must tell you, although I certainly appreciate the information that's contained in letters, I'm very uncomfortable for a court proceeding to make determinations based upon letter communications, rather than briefs. My suggestion would be that I can enter an order granting the plaintiff, first, additional time to submit your position and your request for the amount of damages in the form of a memorandum if you like, you can simply redraft what's in the letter and add any case law that you might deem appropriate and submit that, then grant the defendants addition time after

that to submit their memorandum. If we would be essentially what was submitted to Judge Limbaugh in the memorandum back in November, December of last year, and then update it based on whatever Mr. Hamburg has, that's fine, too. I don't see any need for any further testimony or oral argument in the nature of a hearing or anything of that nature. I think the questions are almost exclusively, from what I see, if not exclusively, questions of law that I should be able to make the determinations after we get the appropriate remedies.

MR. DUREE: Could I say something in response, Your Honor?

THE COURT: Sure. That would be Mr. Duree?

MR. DUREE: Duree, yes.

THE COURT: Okay. Go ahead, sir.

MR. DUREE: The 8th Circuit opinion specifically requires the trustee to first prove his avoidance claim before any question of remedy can be addressed. That's at the end of the opinion. And currently there are no avoidance claims pending. So our initial position is they have to attempt to replead an avoidance claim as a starting point. Beyond that, Your Honor, I don't see how an avoidance claim, which has never been ruled on before, nor evidence submitted in support of it, could be decided simply on briefs and a matter of law because it obviously would involve questions of fact.

THE COURT: Mr. Hamburg?

MR. HAMBURG: Our response to that is, Judge, that that's the position he took in writing. And my position on that is is that there was a pre – there was an assignment of this trademark that he has alleged for purposes of execution was invalid and that the asset remained an asset of the debtor. An now he's, of course, saying that the assignment was valid and it wasn't an asset of the debtor and it was necessary to bring the avoidance claim. I think this Court's found, and it's been

affirmed by the 8th Circuit, that the collection of the money was a violation of the automatic stay. I think for there to be an automatic stay violation the asset collected without relief from the stay was an asset of the estate. And I think what this Court has determined was that the voidable transfer that resulted from the violation of the automatic stay h ad to do with the payment of the $1,717 out without relief from stay so the Court could determine at that point whether it could or could not be paid out, rather than just taken by the appellants, by Mr. Duree's clients. So I think that the issue is not so much that it is a necessity and a condition for recovery that we bring and then succeed on an avoidance action when, in fact, this Court, and I don't think the 8th Circuit has disturbed it, the avoidance action – the voidable transfer, rather was – that resulted from the violation of the automatic stay was the payment out of $100,000 which we would seek the recovery of as an equitable compensatory remedy.

MR. DUREE: Your Honor, that turns the opinion of the 8th Circuit on its head. If I could just quote from the end of the opinion.

> "We do not foreclose the bankruptcy court from returning to the question of remedy after the avoidance issues are finally resolved."

Then it continues,

> "On the other hand, if the trustee fails to prove his avoidance claim, then the trustee has pursued a lost cause and the expense he incurred is a self-inflicted wound."

It's an absolute essential, which we argued continuously from the beginning that the trustee has to plead and prove a claim for avoidance to have any claim against the defendants in this case. The 8th Circuit clearly agreed. All of the avoidance claims have been dismissed. If they would be attempted to be

refiled, we would move to dismiss on the grounds of the statute of limitations. That would have to be decided at that time. But as a starting point, a claim for avoidance has to be filed. The 8th Circuit clearly ruled that a claim for avoidance has to be established before the Court can turn to the issue of remedy. Mr. Hamburg wants the Court to skip that step. That's exactly where we were when we went to the 8th Circuit to begin with. This cannot be resolved without a claim for avoidance being decided. That's specifically what the 8th Circuit ruled. And in order to decide a claim for avoidance I would submit, Your Honor, that a claim for avoidance has to be pleaded. All of the pleaded claims for avoidance were deliberately dropped out of the case and the companion case for strategic purposes. So in order to reach the statute of limitations issue, of course, they have to plead a claim for avoidance, realizing that all claims for avoidance are time barred. Mr. Hamburg asked this Court to rule as though it's no longer necessary to plead or prove a claim for avoidance in order to go to the remedy issue. But that's exactly what the 8th Circuit ruled.

THE COURT: Mr. Hamburg.

MR. HAMBURG: Well, I don't agree with that because I think what this Court has ruled is that the transfer resulted from the payment of the money, that if the avoidance action was necessary to show that these assets were part of the estate, the 8th Circuit could not have found already in affirming your order that, in fact, there was a 362(a) violation.

MR. DUREE: The 8th Circuit did not –

MR. HAMBURG: There was a 362(a) violation because assets of the estate were improperly transferred out to Mr. Duree when he collected on the Sheriff's Sale. You need to have those assets of the estate before you can find a 362(a) violation. Statute of limitation defense which Mr. Duree talks

about would be the defense of FTR (phonetic) Management, not of his client. And FTR Management probably is not in existence to raise that defense. And I don't think that the defense is an appropriate one here.

MR. DUREE: Well, he's turning the 8th Circuit opinion on it head. But if I could, Your Honor, the mandate which is attached to our brief that we filed before Judge Limbaugh, which had attached to it a previous letter sent to Judge Limbaugh, but the mandate says:

> "After consideration it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this Court."

It didn't affirm anything. It reversed and remanded. The opinion addressed several arguments that were advanced by defendants, some it agreed with and some it disagreed with. But the bottom line is the prior judgment was reversed. The case was remanded and the opinion of the 8th Circuit specifically says if the trustee fails to prove his –

> "If the trustee fails his claim for avoidance – to prove his claim—" I'm sorry. "If the trustee fails to prove his avoidance claim, then the trustee has pursued a lost cause and the expense he incurred is a self-inflicted wound."

It couldn't be more clear. Mr. Hamburg recognizes that all such claims were deliberately dropped out for strategic purposes and are time barred. So he simply wants to skip that point. That's exactly why we went up to the 8th circuit to begin with. That's exactly what they ruled. So, Your Honor, I would certainly disagree that this is just a question of law to address the issue of remedy. It is – it involves, first of all, questions of fact on the avoidance claim, which has to be

established, which requires proof, and more importantly, requires a pleading. You can't try a claim on the basis of an oral claim that exists out in space somewhere and no one knows what the alleged facts are. They have to file a written pleading claiming avoidance. If and when they do that, we will move to dismiss on the statute of limitations grounds. If we lose –

MR. HAMBURG: He's estopped from claiming that because he took the exact opposite position when he was trying to execute on this asset of the debtor by claiming that this pre-petition assignment was invalid. He said it was invalid. And that's what allowed him to have the Sheriff's Sale. Now, he's wanting – once he's got the money in his pocket, now he wants to say, well, it was a valid assignment and therefore to recover that hundred thousand, we've got to prove that that was a voidable assignment and that the assignment was not effective to divest the debtor of that asset. Well, he's already taken that position in the state court. And he can't flip flop and the Court has seen law on that when it granted the summary judgment initially.

MR. DUREE: Well, just – Mr. Hamburg deliberately dropped out all avoidance claims over our objection in both cases. We argued that that was a necessary element of any claim against the defendants. The 8th Circuit agreed. Such claims are not –

MR. HAMBURG: (Inaudible) David, in order to execute on this asset that the assignment was, in fact, invalid?

MR. DUREE: I didn't hear what you said there. Our point is this –

MR. HAMBURG: Didn't you argue in the state court that the pre-petition assignment was invalid, thereby giving you the right to execute on this asset of Just Brakes?

MR. DUREE: (Inaudible)

MR. HAMBURG: Isn't that the exact opposite of what you're saying now?

MR. DUREE: If and when you raise a claim for avoidance, I'll be happy to address those issues if you avoid a statute of limitations defense.

MR. HAMBURG: You can rely on this Court's judgment to drop that voidance claim and I did. And, you know, you're ignoring the fact that the same parties are before the Court in this case and there' a tolling even if there was a statute of limitations issue, which there's not.

MR. DUREE: As a – well, Mr. Hamburg, as a starting point –

MR. HAMBURG: What the Court of Appeals found, in fact, was that it believed and Judge Logan (phonetic) believed that there was some sort of punishment intended by the bankruptcy court against the appellant, rather than determining – looking at the bankruptcy court's opinion and finding out that the bankruptcy court at all times was attempting to be compensatory because that's the amount of money that was received. There was no reason to value the value of the trademark. It was simply determining what had been paid out of the estate that shouldn't have been and ordering that that be returned.

MR. DUREE: Well, all of which –

MR. HAMBURG: We're suggesting that it is a matter of law for the Court to rule right now, that it can rule that that's a equitable compensatory remedy, rather than a punitive remedy or a punishment because the Court had the opportunity to award punitive damages and did not, was only attempting to compensate for the estate. And now the Court of Appeals has left open the door for a further hearing with respect to the attorney fees incurred by the trustee in order to recover that

hundred thousand for the benefit of all the creditors, not just Mr. Duree and Mr. Duree's client.

MR. DUREE: Well, Mr. Hamburg, obviously you haven't read the 8th circuit opinion.

MR. HAMBURG: Well, I have, David and you know I have.

MR. DUREE: Nor are you familiar with the pleadings on which the case was tried before, which deleted all claims for avoidance, which are a necessary element of the claim against the defendants. The 8th Circuit so ruled. It did not affirm the prior judgment. It reversed the prior judgment.

MR. HAMBURG: (inaudible)

MR. DUREE: It remanded this case to decide the issue of the avoidance issues before determining any other question. Quote –

MR. HAMBURG: They affirmed –

MR. DUREE: Quote – if I could, please.

MR. HAMBURG: David, they affirmed the fact that they were going to violate the stay.

MR. DUREE: They didn't affirm anything. It affirms nothing.

MR. HAMBURG: They did affirm that.

MR. DUREE: I'm reading from the mandate.

MR. HAMBURG: It says,

"By collecting the foreclosure proceeds appellants violated 362(a)(6)."

That's what the Court of Appeals has said.

MR. DUREE: And let me –

MR. HAMBURG: Violation of the stay imposed by 362 the assets transferred have to be part of the estate and that's what this Court entered the order on many years ago that, in fact, that hundred thousand dollars was removed from the estate without relief from stay being granted.

MR. DUREE: And this Court was reversed previously. If I could, I'll just – I'll say it one more time. I'm quoting from the 8th Circuit opinion.

> "Here, by contrast, the trustee has never established his right to avoid debtor's pre-petition transfer and recover the trademark or its value for the estate."

Then it continues to say,

> "We do not foreclose the bankruptcy court from returning to the question of remedy after the avoidance issues are finally resolved."

And finally it says,

> "If the trustee fails to prove his avoidance claim, then the trustee has pursued a lost cause and the expense he incurred is a self-inflicted wound."

I would respectfully submit, Your Honor, the only way the 8th Circuit opinion can be read is the case is back before the Court to resolve the avoidance claim; as a necessary element of resolving the avoidance claim there has to be an avoidance claim and none is pending.

MR. HAMBURG: Let me just for the record –

THE COURT: Okay. Now, that's enough, Mr. Hamburg.

MR. HAMBURG: Your Honor, this is Steve Hamburg.

THE COURT: Mr. Hamburg –

MR. HAMBURG: With regard to Mr. Duree's reciting from the opinion, the opinion starts out by indicating,

> "The nature of the debtor's present interest in the trademark is an interesting question, but one that we need not resolve because by collecting the foreclosure sale proceeds appellants violated 362(a)(6), which provides –"

And then it goes on to say,

> "This act prejudiced the trustee's ability to litigate a competing avoidance claim on behalf of all creditors and was, therefore, inconsistent with the basic purpose of the automatic stay to prevent creditors from stealing a march on each other. The bankruptcy court correctly concluded that appellants violated the automatic stay."

THE COURT: Okay, gentlemen.

MR. HAMBURG: If that is not, as he said, Judge, an affirmance of that finding, I don't know what is. And as a consequence, the Court said you were trying to punish them by making them pay money back because you didn't say whether it was compensatory or punitive. And they held that you don't have any kind of punitive power constitutionally. My suggestion is, as you pointed out in your opinion, it was compensatory at all times and that it can be handled by simply amending an order nunc pro tunc that that was to be compensatory for the monies removed from the estate without relief from stay, and conduct a further hearing on the attorney fees we've incurred in trying to collect the money that should have gone to all the creditors, not must to Mr. Duree and his clients because they stole the march on all the others.

THE COURT: Okay. Thank you gentlemen.

MR. DUREE: What –

THE COURT: That's enough. That's enough. Thank you, thank you. Stop.

MR. DUREE: Okay.

THE COURT: This is Judge Barta.

MR. HAMBURG: Yes, Judge.

THE COURT: I appreciate your remarks. Thank you very much. What I'm going to do, I've just roughed out here an order that will do essentially what I indicated to you at the

beginning, please. The matter before the Court is the question of damages, if any, associated with a violation of the automatic stay. The order will read something like this. I'll get it out in the mail to you this afternoon.

MR. HAMBURG: Okay.

THE COURT: This is the only fair way that I can see to approach this because you're both very competent counsel, obviously. And I know both of you have read the opinion; you've read the opinions of the district court and the opinion here, too. The – technically we have to reopen the adversary proceeding. So I'll put in something to that effect. I will allow the trustee-plaintiff, since it is back here on a request by the trustee-plaintiff for an award of whatever it is that you want to plead that you are going to call it, damages, some form of compensation, compensatory damages, punitive damages, something for violating the automatic stay. I'll leave that up to how you're going to present it, please, Mr. Hamburg. I'll give you enough time to file a legal memorandum setting forth the request – and I'll have this out to you in the mail, as I said – for damages. Please give some case law to support your authority for not only the amount of damages – I'll use that general term – but also what it is that you feel it should be called. You referred to compensatory damages here. That's fine. Then I will grant some time for the defendants to file a response, again, please. Include – respond to what the plaintiff's arguments are and include the case law to support your position. And then if you want to take a brief couple of days after that to file a reply, Mr. Hamburg, I'll certainly let you do that. And then I will enter the order as quickly as I can after that. Mr. Duree, I'm not answering a determination or finding or an order here with respect to your position that we must go through some sort of a 547 or 548 avoidance procedure first. But I do very clearly see two distinct requests for relief that are

available to the trustee. One is before the Court now, and that it the violation of the automatic stay and what the bankruptcy estate is entitled to as a result of that. The other is the separate questions of 547, 548, or whatever appropriate section there might be, avoidance of the transfer. That is two different issues. That's the way the original opinion was drafted from here. I believe that's the way the Court of Appeals entered its opinion. I believe that's the way the district court looked at it and remanded it back here for our determination. So that we'll proceed with the order that I indicated and the next question would be, Mr. Hamburg, how much time, sir, do you feel is appropriate? Would you need certainly minimum of two weeks? If you want to go out 30 days, that's fine with me, too. We are, as you might suspect, swamped here, so –

MR. HAMBURG: Yeah.

THE COURT: So I'll get it done as quickly as I can. But give yourself enough time, Mr. Hamburg.

MR. HAMBURG: Wasn't there a time when summers were slower?

THE COURT: Oh, ho. Unfortunately, I can't remember that after nineteen and a half years of –

MR. HAMBURG: Okay.

THE COURT: I don't even remember that.

MR. HAMBURG: Well, I would appreciate 30 days and I'll make every effort to get it in before then. But I'd appreciate the latitude.

THE COURT: Today is the 20th. Let's see. Do you have a calendar? What would the be the 20th of – oh, thank you. Okay. Let's see if that's a business day on the 20th of August. It is. Why don't we go out one more day. It's a Thursday. We'll go out to August 21st.

MR. HAMBURG: Okay.

THE COURT: So the plaintiff is to file his legal memorandum not later than the 21st of August, 1998. Please serve that on Mr. Duree as well. Mr. Duree, then how much time after that, sir, for you?

MR. DUREE: Well, I'd like 30 days after that.

THE COURT: Sure.

THE COURT: The 20th is a Sunday. Why don't we skip over to September the 21st, then. How's that?

MR. DUREE: That will be fine, Your Honor.

THE COURT: Okay. Let's see. My calendar shows that's the Rosh Hashanah weekend. Does that interfere with anybody or cause any problems for anyone?

MR. DUREE: Not for me, Your Honor.

MR. HAMBURG: No, I would be the one, and it doesn't.

THE COURT: Okay. That's fine. If not, then, how much time after that, Mr. Hamburg, if you want to file a brief reply to the defendant's response?

MR. HAMBURG: I think ten days would be ample.

THE COURT: Okay. All right, the second of October is a Friday. That's a little bit longer. But why don't we go out till that date. How about October the 2nd?

MR. HAMBURG: Great.

THE COURT: All right. And then the Court will take the matter under submission and –

MR. HAMBURG: For your info, Judge, the – there was an escrow account established about, what two or three weeks ago, Dave?

MR. DUREE: Yes.

MR. HAMBURG: And there is a fund established of about a hundred and thirty-eight thousand and there's an agreement between David and I with respect to escrow instructions and all that sort of thing.

THE COURT: Okay. Interest bearing account, right?

MR. HAMBURG: It is. What is it, Dave?

MR. DUREE: Yes, it's interest bearing.

THE COURT. Okay. All right. All the more reason I will obviously try to get this accomplished as quickly as we can. I think we see what the issues are and there could be quite a few. But all I'm suggesting to you is that the remand is back here for that question of determining if damages are appropriate, what the appropriate name or basis for the damages is and how much. And that's what I will try to address here, what I believe the 8th Circuit's told us to do. Okay, Mr. Hamburg, any other questions, suggestions, sir?

MR. HAMBURG: No, nothing, Judge. Thank you for your time today.

THE COURT: You're welcome. Thank you. Mr. Duree, anything else, sir?

MR. DUREE: Nothing further, Your Honor.

THE COURT: Okay, gentlemen. Thank you very much. And good luck now and try to stay cool.

MR. HAMBURG: All right.

THE COURT. Thank you.

MR. HAMBURG: Goodbye now.

(Proceedings concluded)

CERTIFICATE

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Trancriber (signature) Date 7-27-98

(appears to read Fred Willman)

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
	)	Adv. No. 92-4384-172
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	
	)	Case No. 91-46618-172
Debtor.	)	
	)	CHAPTER 7 PROCEEDING
DAVID A SOSNE, Trustee,	)	
	)	
Plaintiff,	)	
v.	)	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	)	
	)	
Defendants.	)	

ORDER

At St. Louis, in this District, this 21st day of July, 1998.

This matter has been remanded to the United States Bankruptcy Court from the United States District Court for further proceedings consistent with the opinion of the United States Circuit Court for the Eighth Circuit in **In re Just Brakes**, 108 F.3d 881 (8th Cir. 1997).

The Eighth Circuit opinion affirmed the determinations of the Bankruptcy Court and the District Court that the defendants in this Adversary Proceeding had violated the automatic stay, but reversed the award in damages in part because "the value of the trademark is not an appropriate compensatory remedy." **Id**. at 885.

The issue on remand concerns the request of the Trustee as Plaintiff for an award of damages for the Defendants' violation of the automatic stay. So as to preserve the Trustee's rights, the District Court has ordered the Defendants to pay the foreclosure sale proceeds (including interest from October 24, 1991) into escrow pending further determinations in the Bankruptcy Court. In the interests of economy and expediency, these determinations can best be made by the Bankruptcy Court's consideration of the Parties' memoranda of law.

Upon consideration of the announcements and oral argument presented during the telephone conference call on July 20, 1998,

IT IS ORDERED that this Adversary Proceeding is reopened upon the Court's own motion to permit consideration of the issue or issues on remand from the Court of Appeals; and

That **not later than August 21, 1998,** the Trustee/Plaintiff is to file and serve on the Defendants' Counsel a concise legal memorandum setting forth his specific request for damages in this matter, including case citations and other authority in support of his position, consistent with the opinions and orders of the Eighth Circuit Court of Appeals and the United States District Court for the Eastern District of Missouri.

IT IS FURTHER ORDERED that **not later than September 21, 1998,** the Defendants in this Adversary Proceeding area to file and serve on the Attorney for Trustee/Plaintiff a concise response to the Trustee/Plaintiff's request for damages, including case citations and other authority in support of their position, consistent with the opinions and orders of the Eighth Circuit Court of Appeals and

the United States District Court for the Eastern District of Missouri.

IT IS FURTHER ORDERED that the Trustee/Plaintiff may file a reply to the Defendants' Memoranda, **but not later than October 2, 1998**; and that the matter will thereafter be determined by the Court on consideration of the record as a whole.

IT IS FURTHER ORDERED that these memoranda are not to exceed ten (10) pages each of double-spaced typing; and that a further hearing will not be set in this matter unless the Court determines that it is necessary for a just and complete ruling upon the issue on remand.

(signature)
James J. Barta
Chief U.S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUST BRAKES CORPORATE SYSTEMS, INC.,	)	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	)	Adversary Number 92-4384-172
DAVID A SOSNE, Trustee,	)	
Plaintiff,	)	
v.	)	
REINERT & DUREE, P.C, n/k/a REINERT, DUREE & CRANE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. and JAMES C. LANDES,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM REGARDING DAMAGES

COMES NOW David A. Sosne, Chapter 7 Trustee ("Trustee") of the Estate of Just brakes Corporate Systems, Inc. ("Debtor"), by and through his counsel, and submits the following Memorandum in support of his claim for damages.

BACKGROUND

At the time of the filing of this bankruptcy case in 1991, Debtor's interest in a trademark was scheduled for a Sheriff's Sale pursuant to an execution initiated by the Defendant law firm and its clients. The Sheriff's Sale occurred and the trademark was sold to a purchaser which netted the

amount of $100,717 after commission. Because of the bankruptcy, of which the defendants were well aware, the funds were placed in the register of the Circuit Court of St. Louis County pending further order of the Court. Defendants proceeded to obtain a pay-out order and retained the funds in payment of their attorneys' fees.

The trademark, that was the subject of the sale, was owned by Debtor. Within the year immediately prior to the filing of the bankruptcy, the Debtor purportedly transferred the trademark to a company known as FGR Management, an insider of the Debtor, as the President of FGR Management was also a shareholder and director of the Debtor. Defendants, who had obtained a judgment against the Debtor on behalf of their client in 1988, three years before the bankruptcy filing, asserted in judicial proceedings before the Circuit Court that the transfer was void; and upon successfully arguing this position, proceeded to sell the trademark at the Sheriff's Sale.

The Trustee initiated this action against Defendants for violation of the automatic stay and further proceeded to initiate a separate avoidance action against FGR Management. This Court entered judgment in favor of the Trustee and against the Defendants in the amount of $100,717 for the Defendants' willful violation of the automatic stay. As to the action against FGR Management, the Trustee dismissed the adversary proceeding without prejudice, when FGR Management was no longer in operation, its attorney had withdrawn as counsel from the lawsuit, FGR Management was in default in having failed to file an answer to the amended complaint, and the Trustee had obtained a judgment against those Defendants who had violated the automatic stay and obtained the proceeds of the sale.

The District Court affirmed this court's decision in the present adversary proceeding and the Eighth Circuit remanded

this matter to the District Court, which, in turn, remanded the action to this Court.[1]

The Eighth Circuit Court of Appeals stated in its Opinion that "the nature of Debtor's present interest in the trademark is an interesting question but one that we need not resolve because b **collecting the foreclosure sale proceeds,** the Appellants violated §362(A)(6)." The Eighth Circuit Opinion is consistent with this Court's finding that the Defendants willful violated the automatic stay. This case is on remand from the Eighth Circuit to determine the amount and nature of damages to which the Trustee is entitled. Since the Eighth Circuit limited the issue to be resolved in this Court to one of damages and for the imposition of attorneys' fees, the nature of the interest held by the Debtor in the trademark does not need to be resolved and is irrelevant.

THE TRUSTEE IS ENTITLED TO A COMPENSATORY AWARD IN THE AMOUNT OF $100,717 PLUS INTEREST

The proceeds from the Sheriff's Sale became property of the bankruptcy estate under §541 of the Code. This section defines property broadly to include all legal and equitable interests of the Debtor in property as of the commencement of the case. (See §541(a)(1)). It is implicit in the Eight Circuit Opinion as well as the prior opinion of this Court that the proceeds were property of the estate. Otherwise, the collection of them without having first obtained relief from the stay cannot equate to a statutory violation. See §362(a)(6).

The collection of these proceeds by the Defendants denied these funds to the estate so that an order distribution could occur to **all** of the creditors, not just Defendants. The

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[1] In Re: Just brakes Corporate System, Inc., 108 F.3d 881 (8th Cir. 1997)

amount of the value lost was clearly the amount received by the Defendants or the sum of $100,717.00, the amount of the pay-out. In its earlier opinion, this Court correctly ordered this sum to be paid as an equitable compensatory remedy to put the estate in the same position it would have been had there been no statutory violation. In light of the Eighth Circuit Opinion, it would be appropriate to conduct a hearing on the Trustee's attorneys' fees and costs to recover this sum for the benefit of the estate.

Apparently ignoring the initial basis for how the stay was violated (i.e., collecting the proceeds), the Eighth circuit opinion suggests that before the Trustee is entitled to the relief, he may have to prove a "claim for avoidance." It is, however, inconsistent to require the Trustee to have to prove one of his claims for avoidance if the Court has already ruled that by collecting sale proceeds, the automatic stay was violated. Having to prove a claim for avoidance is inconsistent with the statement that it is not necessary to prove the nature of the Debtor's interest in the property. The Eight Circuit has affirmed that the collection of the proceeds was a willful violation of the automatic stay. If the sale proceeds belonged to the Defendants, the collection of those proceeds by the Defendants could not have been a violation of §362.

> The prior opinion of this Court stated:
> A Chapter 7 Trustee is charged with the responsibility of liquidating the assets of a bankruptcy estate for the benefit of creditors. See 11 U.S.C. §704. The Defendants' willful violation of the automatic stay has not only prevented the Trustee from liquidating the assets, but it also required the Trustee to incur the additional expense of litigating these actions. Therefore, a

money judgment in favor of the Trustee is necessary to carry out the provisions of Title 11.

> **An appropriate measure of the amount of the money judgment here is the value of the voidable transfer that resulted from the violation of the automatic stay. As a result of their post-petition collection activity in violation of the automatic stay, the Defendants received the sum of $100,717.00 (representing the gross sale proceeds less the Sheriff's commission). The Trustee, therefore, is entitled to a judgment against these Defendants in the amount of $100,717.00** (citation omitted) (emphasis added).

The voidable transfer which the Court discussed in its prior opinion was the "voidable transfer that resulted from the violation of the automatic stay." This transfer was the pay-out of $100,717.00 to Defendants. Since the amount of the judgment was equal to the amount that was transferred, obviously, this Court intended only to compensate rather than punish. This seems clear from a reading of this Court's prior opinion, especially considering that the Trustee's request for punitive damages was denied.

The Eighth Circuit has now complained that this Court's prior opinion was unclear as to whether or not the award was punitive or compensatory. A review of the Amended Adversary Complaint on which the judgments were based clearly shows that the Trustee requested actual, or compensatory damages, as well as punitive damages, attorneys fees and costs. The bankruptcy court awarded no punitive damages. By implication, it awarded an amount that it believed would compensate the bankruptcy estate for the

loss of funds as a result of the Defendants' violation of the stay.

Interestingly, the Eighth Circuit did not require this Court to conduct a new trial. In fact, the Eighth Circuit left to the discretion of the trial court to fashion a remedy. Such a remedy would be to conclude, based on the record, that the Bankruptcy Court's award and judgment was compensatory. Nowhere in the Eighth Circuit's opinion is there a mandate that an avoidance action be commenced by the Trustee by way of a separate lawsuit. This would be especially needless and a waste of judicial resources when all of the elements of the Trustee's case are already before the Court. Since the "voidable transfer" was the pay-out of the funds, all this Court needs to do is to clarify its opinion and order the funds to be paid back as the appropriate "equitable compensatory remedy." As this and other courts have held, this "equitable compensatory remedy" can be ordered pursuant to §105 of the Bankruptcy Code.

Defendants argue that the only avoidance claim capable of pursuit by the Trustee is the claim to avoid or set aside the assignment of the trademark from the Debtor to FGR Management which would require additional litigation. As noted above, this is not the issue before this Court. Even if this Court were to look at avoidance issues other than the voidable transfer of the sale proceeds, these claims are capable of resolution by this Court based on the record before it. There are several possible avoidance claims:

(1) A claim under §547 and §548 of the Code seeking avoidance of the transfer of the trademark to FGR Management;

(2) A claim under §547 of the Code that the execution by the judgment creditor and the

Sheriff's levy on the personal property was a preferential transfer; and

(3) That in violation of §549 of the Code, there is a post-petition transfer to satisfy a pre-petition liability.

With respect to the first avoidance claim, the Court can recall the Defendants' prior State Court actions in which they asserted the alleged fraudulent conveyance was, as a matter of law invalid. (See e.g., L.F. at p. 232). Defendants' arguments that the trademark could be sold in satisfaction of the judgment against the Debtor were accepted by the state court. This position taken in a prior judicial proceeding estops the Defendants, under the doctrine of judicial estoppel, from a directly contrary assertion that, in fact, the assignment was valid and that the Debtor's estate had no interest in the trademark at the time of sale. The Defendants cannot be permitted to abandon their earlier position to the detriment of an opposing part in a later suit. Buder v. United States, 332 F. Supp. 345 (D.C. MO 1971). (See also Levinson v. United States, 969 F.2d 260 (7th Cir. 1992) and In Re Hutchins, 162 B.R. 1014 (Bkrtcy N.D. Ill. 1994)).

It is further clear from the record that the Trustee makes a prima facie case and would be entitled to relief. This is because the seizure by the Sheriff occurred less than a month prior to the bankruptcy petition. (See L.F., pp. 149-152). The Sheriff's seizure resulted in an involuntary transfer of an interest in satisfaction of an antecedent debt which allowed the creditor (Defendants) to obtain more than it would have obtained in a Chapter 7 proceeding. (Id.) See 11 U.S.C. §547. Additionally, if the Court were to allow Defendants to assert that, in spite of their previous legal positions, that the assignment to FGR was valid, such a transfer is a preference based on the record. This is established as a result of the

status of FGR as an unsecured creditor in the amount of $300,000.00 at the time of the filing of the bankruptcy Petition. (See L.F. at p. 24). The "look-back" period for such a transfer is one (1) year in the event the creditor is an insider. (Examples of "insiders for Bankruptcy purposes is found at 11 U.S.C. §101(31)). There is no dispute that Daryl Dunn, President of FGR Management, was a twenty-five percent (25%) shareholder and director of the Debtor. (See L.F. at p. 37). In fact, in an Order in 1991, the Bankruptcy Court found that Daryl Dunn, president of FGR Management, Inc., was a shareholder and director of the Debtor. (See L.F. at p. 146). Since the present parties were the parties to that earlier Order, this finding collaterally estops the parties from re-litigating that issue. The record evidence before this Court provides sufficient evidentiary support for the Trustee's prima facie case under §547.

With respect to the third claim, the Eighth Circuit has already found that "the trademark was sold to satisfy Appellant 'pre-petition' claim against the Debtor – their 1988 Judgment." Therefore, on remand, this Court can conclude that the Defendants are estopped from challenging the pre-petition assignment, that the Trustee makes a prima facie case under §547 of the Code and the validity of its §549 claim has been established by the Eighth Circuit opinion.

Nevertheless and notwithstanding the foregoing, none of these are claims which this Court earlier described as the voidable transfer. It was the pay-out of funds which this Court's prior opinions suggested was voidable and appropriate non-punitive compensatory relief was ordered by this Court. To find any hidden meaning is this Court's prior Order – that this Court was punishing the Defendants – is a misinterpretation.

If this Court believes that it must value the Debtor's "interest in the trademark", this Court is able to value it in an amount equal to that collected from the sale of the trademark. Moreover, while the Defendants assert that the claim against FGR as transferee of the trademark is barred by the statute of limitations, the Defendants are not parties to such a claim.

As a result, Defendants have no standing to assert an affirmative defense of statute of limitations as suggested in Defendants' assertions. To the contrary, it would appear as if FGR is not likely to assert an defenses at all for the following reasons.

An examination of the companion case formerly pending before Judge Hamilton (4:92CV2298JCH) shows that FGR was in default prior to its lawyer withdrawing from the litigation, all of which preceded the Trustee's dismissal of his claims. On October 13, 1992, the Trustee filed its action against FGR to avoid the transfer of the trademark. On May 6, 1993, FGR filed its Answer to the initial Complaint. On July 13, 1993, the Trustee served its First Amended Complaint by mail pursuant to the Federal Rules of Civil Procedure. Having no response to the First Amended Complaint, the Trustee requested entry of default against FGR on February 25, 1994. The Circuit Clerk entered judgment by default on March 1, 1994 and approximately two (2) weeks thereafter, the Trustee requested the Court to enter the Clerk's default as a judgment. Whether or not the judge erred in not entering the Clerk's default as a judgment on December 16, 1994, on November 30, 1994, the Bankruptcy Court had awarded the Trustee a judgment in the amount of $100,717.00 due to the violation by Defendants when it received the Sheriff sale proceeds. This was followed by FGR's counsel withdrawing from the companion case on February 1, 1995 and on February 14, 1995, the Trustee dismissed the adversary action. It appeared

obvious that FGR was out of business, not defending an indefensible action, and it was pointless to pursue any further action to take a judgment against FGR, especially when the Trustee had received a judgment against a solvent defendant.

This Court could conduct a mini haring to determine the value of the Trustee's claim or it can rely on the record evidence as support for the judgment awarded the Trustee. The Court, based on that record, can enter an award and identify it as an amount equal to the appropriate equitable compensatory remedy as well as order a hearing on the attorney's fees and costs incurred by the Trustee. In so doing, the initial opinion of this Court would retain its integrity in a manner consistent with the mandate from the Eighth Circuit. The opinion of the Eighth Circuit should not serve as a basis to condone the Defendants' actions, in which all three Courts reviewing this issue have found willful violations of the automatic stay. The bankruptcy estate, through the Trustee, is entitled to compensation so that all creditors are allowed to share and to defeat the Appellants' attempts to "steal the march" on the other creditors.

Attorneys' Fees and Costs are Appropriate Under §105(a)

In addition to the compensatory damages a court may award attorneys' fees and costs to the estate. Pace, 67 F.3d 193. (Attorneys' fees and costs are actual damages). An order compensating the estate for the injuries suffered because of the Defendants willful violation of the automatic stay, which includes attorneys' fees and costs is both appropriate and necessary. In re Ogden Modulars, Inc., 184 B.R. 575 (Bkrtcy. E.D.Mo. 1995); (Debtor awarded attorneys' fees and cost for creditors' willful violation of the stay). Defendants willfully violated the automatic stay by executing upon and collecting the foreclosure sale proceeds. They have fought the Trustee at every stage and changed their position a number of times.

Clearly the estate has suffered a loss because of the extensive litigation brought on by the Defendants actions. An award of attorneys' fees and cost is appropriate and a hearing should be held to determine the actual loss suffered by the estate. The Eighth Circuit opinion states that the Defendants have needlessly cost the estate and litigation expenses if this Court believes the proceeds of the sale belong in the Debtor's estate. (In Re Just brakes, supra at p. 886). The Eighth Circuit opened the door to this Court to address the issue of quantifying those expenses and including them as part of the judgment against the Defendants. The Trustee requests leave to file evidentiary material to support its request for fees and expenses.

CONCLUSION

For the reasons set forth herein, the Trustee is entitled to a compensatory award of $100,717, together with interest from the date of the initial judgment in addition to attorneys' fees, expenses and other costs of litigation.

SUMMERS, COMPTON, WELLS & HAMBURG

(signature)

Steven M. Hamburg #3313

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	U.S. Bankruptcy Case No. 91-46618-172
	)	
Debtor.	)	United States Bankruptcy Adversary No. 92-4384-172
	)	
DAVID A SOSNE, Trustee,	)	U.S. District Court Cause No. 4:95 CV 226 SNL
Plaintiff,)	)	
v.	)	
	)	
REINERT & DUREE, P.C, GARY ROBBINS, ROBBINS &) ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MEMORANDUM OF LAW REGARDING DAMAGES

COME NOW Defendants, Reinert & Duree, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James C. Landes, and respond to Plaintiff's Memorandum of Law Regarding Damages, as follows:

I. THE LAW OF THE CASE DOCTRINE BARS THE COURT FROM CONSIDERING THE ISSUE OF REMEDY BEFORE THE TRUSTEE ESTABLISHES A CLAIM FOR

AVOIDANCE OF THE JANUARY, 1991 PRE-PETITION ASSIGNMENT OF THE TRADEMARK

Plaintiff argues that the Eighth Circuit remanded this case to determine "the amount and nature of damages" to which the Trustee is entitled. See page 3 of Plaintiff's Memorandum.

Plaintiff's position is contrary to the Eighth Circuit opinion in this case which must be followed under the law of the case doctrine. In Re: Just Brakes Corporate Systems, Inc., 108 F.3d 881 (8th Cir. 1997) provides:

> (at p. 885)
> Here, by contrast, the trustee has never established his right to avoid debtor's pre-petition transfer and recover the trademark or its value for the estate.
> * * *
> (at p. 886)
> In vacating the $100,717.00 award and substituting an order to pay the proceeds into escrow, we do not foreclose the bankruptcy court from returning to the question of remedy after the avoidance issues are finally resolved. For example, if the trustee proves that the trademark proceeds belong in the debtor's estate, then appellant's violation of the automatic stay has needlessly cost the estate delay

> and litigation expense. On the other hand, if the trustee fails to prove his avoidance claim, then the trustee has pursued a lost cause, and the expense he incurred is a self-inflicted wound.
> For the foregoing reasons, the District Court's March 29, 1996 order is reversed and the case is remanded for further proceedings consistent with this opinion. (Emphasis added).

The Eighth Circuit opinion provides that this Court may return to the issue of remedy only after the trustee has proved a claim for avoidance of the January, 1991 pre-petition assignment of the trademark.

This Court is required to follow the Eighth Circuit opinion under the law of the case doctrine, Robertson Oil Company, Inc. v. Phillips Petroleum Company, 14 F.3d 373, 383, n. 13 (8th Cir. 1993); Liberty Mutual Ins. Co. v. Elgin Warehouse and Equipment, 4 F.3d 567, 571-72 (8th Cir. 1993).

Plaintiff incorrectly suggests that this Court may simply consider the issue of remedy, without requiring Plaintiff to prove a claim for avoidance of the January, 1991 pre-petition assignment of the trademark. The law of the case doctrine requires otherwise.

II. THE LAW OF THE CASE DOCTRINE PRECLUDES THIS COURT FROM RULING THAT THE PROCEEDS OF

THE SHERIFF'S SALE OF THE TRADEMARK WERE PROPERTY OF THE BANKRUPTCY ESTATE

Plaintiff persists in arguing that the proceeds of the sheriff's sale became the property of the bankruptcy estate under 11 U.S.C. § 541, that the Eighth Circuit implicitly ruled that the proceeds of the sheriff's sales were the property of the estate (Plaintiff's Memorandum at p. 3) and that the Eighth Circuit opinion is inconsistent with the Bankruptcy Court's prior rulings by suggesting that Plaintiff may have to prove a claim for avoidance before reaching the issue of remedy (Plaintiff's Memorandum at p. 4). Even if the January, 1991 assignment of the trademark were to be set aside as to the creditors of Just Brakes, an ownership interest in the trademark would not be re-established in the Debtor, and therefore would not become property of the Debtor's estate under 11 U.S.C. § 541. Kahn v. Royal Banks of Missouri, 790 S.W.2d 503, 506 [1, 2] (Mo. App. 1990); Loe v. Downing, 325 S.W.2d 479, 482 [2] (Mo. App. 1959). 11 U.S.C. §§ 541, 547(b), 548(a) and 550(a). Missouri state law controls on these issues. In Re: N.S. Garrott & Sons, Inc., 772 F.2d 462, 467 [7, 8] (8th Cir. 1985). The Eighth Circuit held it was not necessary to determine whether an unproven claim for avoidance was property of the bankruptcy trustee, because, on remand, Plaintiff would be required to prove its claim for avoidance before the Court could consider the issue of remedy.

The Eighth Circuit ruled that this Court must (not may) determine Plaintiff's claims for avoidance before returning to the issue of remedy. Any inconsistency between this Court's previous rulings and the Eighth Circuit opinion have been resolved in favor of the Eighth Circuit. This Court may not overrule or modify the Eighth Circuit opinion.

The Eighth Circuit also specifically held that Defendants violated the automatic stay, irrespective of the nature of the Debtor's present interest in the trademark, under 11 U.S.C. § 362(a)(6) because they prejudiced "the Trustee's ability to litigate a competing avoidance claim on behalf of all creditors * * *." In Re: Just Brakes, 108 F.3d 881, 884 (8th Cir. 1997).

The Eighth Circuit then distinguished the case at bar from In Re: Calstar, 159 B.R. 247, 257-58 (Bankr. D. Minn. 1993), by holding that the Trustee has never established his right to avoid the Debtor's pre-petition transfer and recover the trademark or its value for the estate. In Re: Just Brakes, 108 F.3d 881, 885 (8th Cir. 1997). The Eighth Circuit ruled that this Court may return to the issue of remedy only after the Trustee proves his claim for avoidance of the January, 1991 pre-petition assignment of the trademark. Id. p. 886.

The law of the case doctrine requires Plaintiff to prove a claim for avoidance of the January, 1991 pre-petition assignment of the trademark to F.G.R. Management, Inc., before this Court may return to the issue of remedy. Robertson Oil Company, Inc. v. Phillips Petroleum Company, 14 F.3d 373, 383, n. 13 (8th Cir. 1993); Liberty Mutual Ins. Co. v. Elgin Warehouse and Equipment, 4 F.3d 567, 571-72 (8th Cir. 1993). This may not be done by memoranda of law or without a pleaded claim for avoidance or without a hearing on the merits of any avoidance claim on which Defendants are entitled to a jury trial in the District Court.

III. THE EIGHTH CIRCUIT DID NOT PARTIALLY AFFIRM THIS COURT'S PRIOR JUDGMENT

This Court's order of July 21, 1998 states, at page 1, that the Eighth Circuit affirmed the prior determinations of the

Bankruptcy Court that the Defendants had violated the automatic stay, "but reversed the award of damages in part because 'the value of the trademark is not an appropriate compensatory remedy.'" In fact, the Court reversed the prior judgment of the Bankruptcy Court. It was not partially affirmed. While the Eighth Circuit held that there was a violation of the automatic stay by the Defendants, it further held that this Court could return to the question of remedy only after resolving the avoidance issues, and that "if the trustee fails to prove his avoidance claim, then the trustee has pursued a lost cause, and the expense he incurred is a self-inflicted wound." In Re: Just Brakes, 108 F.3d 881, 886 (8th Cir. 1997). This Court incorrectly interpreted the Eighth Circuit opinion, at page 2 of this Court's July 21, 1998 order, when it held: "The issue on remand concerns the request of the trustee as plaintiff for an award of damages for defendants' violation of the automatic stay." This Court may return to the issue of remedy only after the Trustee has successfully proven a claim for avoidance of the January, 1991 pre-petition assignment of the trademark. This may not be done by memoranda of law or without a pleaded claim for avoidance or without a hearing on the merits of the avoidance claim on which Defendants are entitled to a jury trial in the District Court.

IV. THERE IS NO CLAIM FOR AVOIDANCE PENDING

The Plaintiff filed two adversary complaints. This one, Cause No. 92-4384-172, and a separate adversary complaint, No. 92-4473-172, also Cause No. 4:92 CV 002298 JCH in the United States District Court for the Eastern District of Missouri. F.G.R. Management, Inc. was a defendant in adversary complaint No. 92-4473-172 (assigned to Judge

Hamilton in the United States District Court) but was not a defendant in this adversary complaint.

In order to obtain a remand of this adversary complaint from the United States District Court (pending before Judge Limbaugh), Plaintiff, in the current adversary complaint, deleted its claims for avoidance. On August 24, 1993, Judge Limbaugh remanded this adversary complaint to this Court on the grounds that the claims for avoidance had been deleted. A copy of that Memorandum and Order are attached hereto as Exhibit A. Judge Limbaugh ruled (page 4 of Exhibit A):

> The plaintiff Trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this.

In remanding the case to this Court on August 24, 1993, Judge Limbaugh further stated, at pages 3 and 4 of that Order:

> (at page 3)
> They [defendants] further contend that although the amended adversary complaint eliminates the claim that the January 10, 1991 assignment of the subject trademark by the debtor was a voidable preference, this issue must first be resolved before the issue of the alleged violation of the automatic stay can be addressed.

> They argue that they are entitled to have the issue of the voidable preference tried in the district court by a jury.
> The amended adversary complaint that presently stands before this Court states only a claim for violation of the automatic stay.
> (at page 4)
> The defendants will get their opportunity to have these claims tried before a jury. Whether these claims will be resolved prior to any hearing on the complaint regarding the alleged violation of the automatic stay is perhaps something to be worked out among the parties, Judge Hamilton and the bankruptcy court.
> The plaintiff trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this. (Emphasis added).

Rather than try the claims for avoidance before a jury before Judge Hamilton, as suggested by Judge Limbaugh, Plaintiff elected to dismiss its claims before Judge Hamilton on February 14, 1995. A copy of the Motion to Dismiss, and

the endorsed Order granting the dismissal over the objection of the Defendants, is marked as Exhibit B and attached hereto.

Plaintiff acknowledged in paragraph 4 of its Motion to Dismiss that the claims filed in the two separate adversary complaints sought similar relief.

Plaintiff has not re-filed or attempted to re-file, a claim for avoidance of the January, 1991 pre-petition assignment of the trademark. The Eighth Circuit has held that it is necessary for Plaintiff to prove a claim for avoidance before the Court can consider the issue of remedy. Plaintiff may not prove a claim for avoidance until Plaintiff has, at the very least, filed a pleading stating a claim for avoidance. Fed. R. Civ. P. 8 requires a pleading setting forth any claim for relief. -While a complaint need only provide a short statement of the plaintiff's claim that gives fair notice of the claim and the grounds for relief, the filing of such a pleading is mandatory. Smith v. St. Bernard's Regional Medical Center, 19 F.3d 1254, 1255 (8th Cir. 1994). Fed. R. Civ. P. 9(g) requires that when items of special damages are claimed, they shall be specifically stated. Not only has the Plaintiff failed to file a complaint for avoidance of the January, 1991 pre-petition assignment of the trademark, Plaintiff has also failed to file a complaint specifically alleging any special damages claimed, as required by Fed. R. Civ. P. 9(g).

This Court may not consider the issue of remedy until Plaintiff has proved a claim for avoidance of the January, 1991 pre-petition assignment of the trademark, and this Court may not consider the issues of avoidance until a claim for avoidance, and any claims for special damages, has been pleaded under Fed. R. Civ. P. 8(a) and 9(g).

V. ANY CLAIM FOR AVOIDANCE OF THE JANUARY, 1991 PRE-PETITION ASSIGNMENT OF THE

TRADEMARK IS BARRED BY THE STATUTE OF LIMITATIONS

Prior to August 24, 1993, Plaintiff dismissed all claims for avoidance in this adversary complaint, No. 92-4384-172, as set forth in Exhibit A attached, and on February 14, 1995, Plaintiff dismissed his claims for avoidance in adversary No. 92-4473-172 (then pending before Judge Hamilton in the U.S. District Court), over the objection of the Defendants there.

Plaintiff has attempted to treat the Eighth Circuit opinion as one requiring resolution of only the issue of remedy, instead of requiring Plaintiff to prove a claim for avoidance, because Plaintiff's claims for avoidance are time-barred by the statute of limitations.

There is no claim for avoidance pending. All such claims for avoidance, in this action, and in the separate adversary complaint that was pending before Judge Hamilton, have been dismissed, over the objections of the Defendants. The time for re-filing any such claims for avoidance is barred by the statute of limitations, 11 U.S.C. § 546(a)(1991), which applies to these bankruptcy proceedings. The bankruptcy case was opened on October 15, 1991, and the two separate adversary complaints were filed during September and October, 1992.

11 U.S.C. § 546(a)(1991) provides:

> An action or proceeding under Section 544,545, 547, 548, or 553 of this Title may not be commenced after the earlier of –
>
> (a) 2 years after the appointment or election of the first trustee * * *; or

(2) the time the case is closed or dismissed.

Section 546(a) was amended in 1994, but that amendment applies only to bankruptcy cases filed after October 22, 1994. Since the bankruptcy case in these proceedings was filed on October 15, 1991, the earlier version of the statute of limitations applies. See McCuskey, Trustee v. Central Trailer Services, Ltd., 37 F.3d 1329, 1330 (8th Cir. 1994), where the court held that 11 U.S.C. § 546(a)(1)(1991) required the trustee to file adversary proceedings seeking recovery of preferential transfers under 11 U.S.C. § 547 within two years after the appointment of the trustee.

The Eighth Circuit held that the trustee's claims under 11 U.S.C. § 547, filed more than two years after the trustee was appointed, were barred by the statute of limitations.

The right to assert a claim for avoidance at this juncture is time-barred by the applicable statute of limitations, 11 U.S.C. § 546(a)(1991).

VI. F.G.R. MANAGEMENT, INC. IS A NECESSARY PARTY TO ANY CLAIM FOR AVOIDANCE OF THE JANUARY, 1991 PRE-PETITION ASSIGNMENT OF THE TRADEMARK TO IT

F.G.R. Management, Inc. was a defendant in the adversary complaint assigned to Judge Hamilton (the other adversary complaint). This adversary complaint was dismissed, over Defendants' objection, on February 14, 1995. On December 16, 1994, the court denied the motion of Plaintiff, in the other adversary complaint, for a default judgment against F.G.R. Management, Inc. Exhibit C, p. 7, December 16, 1994 entry. Plaintiff, David A. Sosne, Trustee, then dismissed that adversary complaint without obtaining a

default judgment against F.G.R. Management, Inc., or a judgment against any other party. See Exhibit B and Exhibit C, p. 7. A copy of the docket entries in the other adversary complaint are attached hereto as Exhibit C. See the entry of December 16, 1994 on p. 7.

Fed. R. Civ. P. 19(b) requires dismissal of any new claims for avoidance (none have been filed) which do not include F.G.R. Management, Inc. as a defendant, because F.G.R. Management, Inc., as the recipient of the January, 1991 pre-petition assignment of the trademark, would be an indispensable party to any such claims for avoidance.

VII. ANY CLAIMS FOR AVOIDANCE BY PLAINTIFF HAVE BEEN DISMISSED WITH PREJUDICE UNDER THE DOUBLE DISMISSAL RULE IN FED.R.CIV. P. 41(a)(1)

Plaintiff dismissed its claims for avoidance in the current adversary action, without prejudice, on or before August 24, 1993. See pages 3 and 4 of Exhibit A attached. Plaintiff then dismissed its second adversary complaint on February 14, 1995, when it dismissed the adversary complaint pending before Judge Hamilton, without prejudice, over the Defendants' objections. See Exhibit B attached.

Plaintiff has acknowledged that the claims for relief are "similar." See paragraph 4 of Exhibit B. In fact, the claims in both adversary complaints requested the same relief, recovery of the trademark and/or its proceeds for the bankruptcy estate. As a result, the second dismissal of the avoidance claims (Exhibit B) on February 14, 1995 was with prejudice, because it was the second dismissal of an action based on or including the same claim as the first dismissal. Fed. R. Civ. P. 41(a)(1) provides:

> * * * the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

CONCLUSION

The Court may not consider the issue of remedy until Plaintiff proves a claim for avoidance of the January, 1991 pre-petition assignment of the trademark. All such claims for avoidance have been dismissed, in this action during August, 1993, and in the other adversary complaint during February, 1995. Such claims for avoidance may not be tried without a complaint for avoidance and for special damages under Fed. R. Civ. P. 8(a) and 9(g), which pleadings have not been filed. Any attempt to file claims for avoidance, if any attempt is ever made, will be time-barred under the applicable statute of limitations, 11 U.S.C. § 546(a)(1991). McCuskey, Trustee v. Central Trailer Services, Ltd., 37 F.3d 1329, 1330 (8th Cir. 1994). Fed. R. Civ. P. 19(b) would also require dismissal of any new claim for avoidance which does not include F.G.R. Management, Inc. as a defendant, because F.G.R. Management, Inc. would be an indispensable party to any claim for avoidance of the January, 1991 assignment of the trademark to it. Any claim for avoidance is also barred by the double dismissal rule of Fed. R. Civ. P. 41(a)(1).

WHEREFORE, Defendants respectfully move the Court to deny Plaintiff's request for damages, and to hold, as a matter of law, that any potential claims for avoidance of the

January, 1991 pre-petition assignment of the trademark to F.G.R. Management, Inc. are time-barred by the statute of limitations and/or must be dismissed under Fed. R. Civ. P. 19(b) unless F.G.R. Management, Inc. is made a party thereto and/or must be filed before a claim for avoidance may be proven and because any claim for avoidance and related claim for recovery of the trademark or its proceeds is barred by the double dismissal rule of Fed. R. Civ. P. 41(a)(1).

Respectfully submitted,

David M. Duree

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(CIVIL DOCKET FOR CASE #92-CV-2298)

JUST BRAKES CORPORATE SYSTEMS, INC.,
Debtor.

DAVID A SOSNE, Trustee,
Plaintiff,

v.

F.G.R. MANAGEMENT, INC., GARY ROBBINS, WILLIAM G. FREEBERSYSER, CAROLE L. FREEBERSYSER, AND JAMES C. LANDES,

Defendants.

DOCKET/MINUTE ENTRIES

* * *

02/25/94	19	MOTION by plaintiff David A. Sosne for entry of default as to F.G.R. Management, w/memo in support and declaration of Steven Hamburg and proposed entry of default attached (cla) [Entry date 02/28/94]
03/1/94	20	DEFAULT ENTERED as to defendants F.G.R. Management, (cc: all counsel) (cla) [Entry date 03/02/94]

* * *

12/16/94	45	ORDER by Honorable Catherine D. Perry denying motion for leave to supplement objections to mtn for leave to file 2nd amd cmp and add party [36-1], denying motion to add party Reinert, Duree & Crane, P.C. [35-1],

denying motion for leave to file mtn to add deft and 2nd amended adversary complaint [34-1], denying motion to dismiss [37-1], denying motion for default judgment against F.G.R. Management, [23-1] (cc: all counsel) (lsd) [Entry date 12/19/94]

* * *

02/14/95 47 RULED DOCUMENT by Honorable Catherine D. Perry granting motion to dismiss [47-1] over objection of deft Robbins dismissing case without prejudice (cc: all counsel) (lsd) [Entry date 02/15/95]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	United States Bankruptcy Adversary No. 92-4384-172
DAVID A SOSNE, Trustee,	U.S. District Court Cause No. 4:95 CV 226 SNL
Plaintiff,	
v.	
REINERT & DUREE, P.C, GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,	
Defendants.	

DEFENDANTS' MOTION TO STRIKE

COME NOW Defendants, Reinert & Duree, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James C. Landes, and move the Court to strike Plaintiff's Memorandum Regarding Damages, on the following grounds:

Defendants rely upon the authority set forth in their Response to Plaintiff's Memorandum of Law Regarding Damages, filed simultaneously herewith.

At pages 4 and 5 of its Memorandum of Law Regarding Damages, Plaintiff argues that the Eighth Circuit is

wrong. However, Plaintiff and this Court are bound by the Eighth Circuit ruling under the law of the case doctrine.

At page 3 of its Memorandum, Plaintiff argues that this case is on remand from the Eighth Circuit to determine the amount and nature of damages to which the Trustee is entitled. The Eighth Circuit opinion, however, requires the Plaintiff to first prove a claim for avoidance, before the Court may consider the issue of remedy.

At pages 3 and 4 of its Memorandum, Plaintiff claims that the proceeds of the sheriff's sale of the trademark are property of the bankruptcy estate under 11 U.S.C. § 541. However, the Eighth Circuit specifically held that it need not determine whether a claim for avoidance was property of the bankruptcy estate, and that a claim for avoidance must be proved by the Plaintiff before the Court may consider remedy. Moreover, it is clear that any claim (as yet unfiled and unproven) that the January, 1991 assignment of the trademark is void as to the creditors of Just Brakes, would not restore the trademark or its proceeds to the Debtor, Just Brakes, and therefore the bankruptcy estate under 11 U.S.C. § 541. The Eighth Circuit held that the Plaintiff must prove a claim for avoidance before the Court considers the issue of remedy. The Eighth Circuit opinion controls over any prior inconsistent rulings by the bankruptcy or district courts.

At pages 6, 7 and 8, Plaintiff argues that Defendants are judicially estopped and/or collaterally estopped from contesting any claim of the Trustee that the January, 1991 pre-petition assignment of the trademark is a voidable transfer. An argument of judicial estoppel or collateral estoppel may not be asserted where a pleading asserting estoppel has not been filed. Fed. R. Civ. P. 7, 8 and 9. Moreover, a claim of judicial or collateral estoppel may not be asserted, offensively, on the

issue of avoidance, where a claim for avoidance is not pending.

Moreover, any attempt to assert a claim for avoidance is barred by the statute of limitations, and any claim for avoidance and recovery of the trademark or its proceeds has been dismissed with prejudice under the double dismissal rule of Fed. R. Civ. P. 41(a)(1).

At pages 6, 7 and 8 of its Memorandum of Law Regarding Damages, Plaintiff argues that the Court may determine a claim for avoidance under 11 U.S.C. § 547, 548 or 549 even though no claim for avoidance is pending. The Court may not determine unfiled, non-pending claims.

Plaintiff then suggests that the voidable transfer was actually the post-petition pay-out of funds from the Clerk of St. Louis County to the Defendants that is the voidable transaction. See page 8 of Plaintiff's Memorandum of Law. No such claim is pending, or filed, and the Eighth Circuit opinion specifically provides that Plaintiff must prove that the January, 1991, pre-petition, assignment of the trademark must be proven to be an avoidable transaction by the Trustee before this Court may consider the issue of remedy.

CONCLUSION

Plaintiff's Memorandum of Law Regarding Damages argues that the Eighth Circuit opinion is wrong, argues judicial estoppel and collateral estoppel preclude Defendants from responding to a non-filed, non-pending claim for avoidance, and improperly urges the Court to determine unfiled, non-pending claims for avoidance, without the benefit of pleadings, evidence or a hearing. Moreover, contrary to the assertions of Plaintiff, the Eighth Circuit did not determine, explicitly or implicitly, that the trademark or its proceeds were property of the bankruptcy estate.

Any possible claims for avoidance of the January, 1991 pre-petition assignment of the trademark, and recovery of the trademark or its proceeds, is barred by the statute of limitations, 11 U.S.C. § 546(a)(1991), and are barred by the double dismissal rule of Fed. R. Civ. P. 41(a)(1).

For these reasons, and based upon the authority set forth in Defendants' Response filed simultaneously herewith, Defendants move the Court to strike Plaintiff's Memorandum of Law Regarding Damages.

DAVID M. DUREE
David M. Duree & Associates, P.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	U.S. Bankruptcy Case No. 91-46618-172
	)	
Debtor.	)	United States Bankruptcy Adversary No. 92-4384-172
	)	
DAVID A SOSNE, Trustee,	)	U.S. District Court Cause No. 4:95 CV 226
SNL		
Plaintiff,	)	
	)	
v.	)	
	)	
REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MEMORANDUM OF LAW REGARDING DAMAGES

COMES NOW Plaintiff, David A. Sosne, Trustee, by and through his attorneys, and in reply to Defendants' Response with respect to Plaintiff's request for damages, submits the following Memorandum:

The Defendant law firm has lined its pocket at the expense of other creditors of Just Brakes Corporate Systems, Inc., the debtor. The Defendant law firm,

admitted aware of a pending bankruptcy proceeding, proceeded ex parte to obtain funds in which the Debtor had an interest. It then caused the Debtor to spend thousands and thousands of dollars in attorney's fees in an attempt to recover this sum which should not have been taken from the bankruptcy estate in the first place.

This Court correctly ruled that to compensate the Debtor's estate for the taking of the Debtor's money, in violation of 362(a) which bars such conduct, the Defendant law firm should return that money to the estate. Rather than doing soon a straightforward basis and filing its Proof of Claim to recover its pro rata portion of the funds, it chose to litigate this matter. The Defendant law firm has taken the matter twice to the Court of Appeals and once to the United States Supreme Court. This Court did not intend to punish the Defendant law firm for its conduct, but merely to order the return of monies rightfully belonging in the bankruptcy estate.

Once again, the Defendant law firm misses the mark in its argument that the Court must determine the legitimacy of the transaction relating to the assignment of the debtor's trademark. This Court was quite clear that at this time, the Court's analysis and decision was limited to the issue of damages from conduct that had already occurred, namely the transfer to the Defendant law firm of $100,717.00 from this Debtor's estate. The Defendant law firm's continuing efforts to obfuscate the issues for this Court merely show the lengths to which the Defendant law firm continues to go to avoid paying this money back.

The Trustee has incurred significant attorney's fees to perform his duties of administering on this asset

to affect a return of the funds. These fees should properly be the expense of the Defendant law firm who has caused them to be incurred.

As Judge Limbaugh stated in a prior opinion in this case, the Defendant law firm is not entitled to any trial – jury or otherwise. Plaintiff is entitled to a judgment in the full amount of its claim together with interest from the date of this Court's original Judgment. Plaintiff is also entitled to an award of attorney's fees. Plaintiff requests leave to submit affidavits to the Court with respect to the fees incurred for the Court to determine the amount of fees and expenses to which Plaintiff is entitled.

SUMMERS, COMPTON, WELLS & HAMBURG

(signature)

Steven M. Hamburg #3313

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	Adv. No. 92-4384-172
JUST BRAKES CORPORATE SYSTEMS, INC.,	Case No. 91-46618-172
Debtor.	CHAPTER 7 PROCEEDING
DAVID A SOSNE, Trustee,	
Plaintiff,)	
v.	
REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	
Defendants.	

MEMORANDUM

At St. Louis, in this District, this 29th day of June, 2000.

The issue determined in this Memorandum is the appropriate remedy that is available to a Chapter 7 trustee on behalf of a corporate debtor for a violation of the automatic stay of 11 U.S.C. § 362. The matter is before the Bankruptcy Court on remand for further proceedings consistent with the opinion of the Eighth Circuit United States Court of Appeals in **Sosne v. Reinert & Duree et al. (In re Just Brakes)**, 108 F.3d 881 (8th Cir. 1997).

The original Adversary Complaint here was filed on September 18, 1991, by David A. Sosne ("(Trustee")

as Trustee in the Chapter 7 case of Just Brakes Corporate Systems, Inc. ("Debtor"). The Trustee amended the Complaint on March 29, 1994, and requested enforcement of the automatic stay and an assessment of damages for a willful violation of the automatic stay of 11 U.S.C. § 362 in connection with the sale of the Debtor's trademark.

On November 30, 1994, the bankruptcy court entered a Memorandum and Order that granted summary judgment to the Trustee on the Amended Complaint. On April 1, 1996, the United States District Court for the Eastern District of Missouri affirmed the Bankruptcy Court opinion and denied the Defendants' appeal. On March 13, 1997, the United States Court of Appeals for the Eighth Circuit reversed the District Court order and remanded the case for further proceedings consistent with the Appellate Court opinion. It its opinion, the Court of Appeals agreed with certain conclusions and rulings of the bankruptcy court, but determined that the value of a certain trademark was not an appropriate compensatory remedy for violation of the automatic stay in these circumstances. **Just Brakes**, 108 F.3d at 885. On March 2, 1998, the District Court remanded the case to the bankruptcy court for further proceedings consistent with the opinion of the Eighth Circuit Court of Appeals.

After a telephone conference call among the Bankruptcy Court and Counsel for the Trustee and Counsel for the Defendants, the Court entered an Order dated July 21, 1998 that established a schedule for the submission of legal memoranda concerning the request for damages in this matter, consistent with the opinion of the Eighth Circuit Court of Appeals. After the filing

deadlines had passed, the matter was taken under submission by the Court. The entry of the Court's Memorandum and Order here was delayed in part by the need to reexamine more than eight years of legal actions in two bankruptcy cases, and the need to reconstruct a pleading that was apparently never received by the Court.

Although the question here concerns the remedy for the Defendants' post-petition actions, the Court must briefly examine the Parties' pre-petition positions to establish a basis f or fixing an appropriate compensation for the violation of the automatic stay.

Automatic Stay

The determinations set out here are based upon a consideration of the record as a whole. Notwithstanding the various pleadings, letters and memoranda submitted by the Defendants that have argued in support of the need to address several other facts and legal issues, the Court has determined that the issue on remand concerns the appropriate remedy for a willful violation of the automatic stay that is available to a Chapter 7 Trustee on behalf of the estate of a corporate debtor.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws.... The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an

> orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

In re Ahlers, 794 F.2d 388, 394 n. 3 (8th Cir. 1986).

If meaning is to be given to the protection intended by the automatic stay, the bankruptcy courts must display a certain rigor in reacting to violations of the automatic stay. **Soares v. Brockton Credit Union (In re Soares)**, 107 F.3d 969, 975 (1st Cir. 1997).

Other than the punitive damage award in 11 U.S.C. §362(h), Congress has conferred no power on the bankruptcy courts to punish for violation of Section 362(a). **Just Brakes**, 108 F.3d at 884-885. Therefore, an appropriate remedy for violation of the automatic stay in a corporate case is a compensatory equitable remedy. **Just Brakes**, 108 F.3d at 885. As a court of equity, the bankruptcy court has the ability under 11 U.S.C. §105(a) to fashion a remedy to correct a wrong. Compensation is intended to make the injured or wronged party whole, or at least to attempt to return the parties to their status before the harm occurred. **Tull v. United States**, 481 U.S. 412, 422, 107 S.Ct. 1831, 1838 (1987), **Kampa v. White Consolidated Industries, Inc.**, 115 F3d 585, 586 (8th Cir. 1997). In many instances, an equitable remedy will include a realignment of rights, a return of property, or a monetary award to replace what was lost.

The Debtor's trademark that is described in this proceeding was sold by an order of the Missouri Circuit Court to satisfy the Defendants' pre-petition claim against the Debtor. After commencement of this bankruptcy case, the Defendants continued their

collection actions on their pre-petition judgment and received the sale proceeds out of escrow. As determined in the earlier Bankruptcy Court proceeding, the Defendants' collection action violated the automatic stay. **Just Brakes**, 108 F.3d at 884.

As noted in the previous decisions, and in the written opinion of the Court of Appeals, the Defendants violated the provisions of the automatic stay that operated to protect the Debtor's and the bankruptcy estate's interest in the Debtor's trademark and in the bankruptcy estate's claims to recover transferred property or the value of transferred property. Based on the legal and equitable reasons discussed below, the Court has determined that the Defendants' violation of the automatic stay deprived the bankruptcy estate of its interest in the Debtor's trademark.

Pre-Petition Transfer

In 1988, prior to the commencement of this case, the Defendants obtained a judgment against the Debtor for $104,583.33. In January 1991, the Debtor's president executed an assignment of the Debtor's trademark to F.G.R. Management, Inc. Also in January 1991, the Defendants filed a request in state court for a Writ of Execution and a petition for injunctive relief to enjoin the transfer of the trademark and certain other assets of the Debtor. In the state court proceeding, the Defendants argued that this purported assignment of the Debtor's trademark was invalid as a matter of law because the Debtor's corporate charter had been forfeited on or about May 22, 1990. (File Document No. 36, Exhibit No. 11). The Defendants have also argued that the Debtor's transfer of the trademark was a fraudulent conveyance with respect to their interests.

(File Document No. 30, pg. 9, **Brief in Support of Defendants' Motion for Summary Judgment.**) The Missouri Circuit Court agreed with the Defendants' arguments and scheduled a foreclosure sale of the Debtor's trademark to satisfy the Defendants' judgment.

The sale was stayed when the Debtor filed a petition for reorganization under Chapter 11 on July 30, 1991. In dismissing the reorganization case based upon the information submitted at that time, the Bankruptcy court determined that the Chapter 11 estate interest in the trademark that was the Debtor's claim to avoid a pre-petition assignment was protected by the automatic stay. Upon the subsequent commencement of this Chapter 7 Bankruptcy case, the Debtor's claim that existed in the Chapter 11 case, as well as the Debtor's interests that were based on state law and that resulted from the state court proceedings, became assets of the Chapter 7 estate that were protected by the automatic stay. Before the Trustee could recover the assets, or realize their value for the benefit of this estate, the assets and the proceeds of the sale of the assets were collected by the Defendants without a request for or a grant of relief from the automatic stay.

The transfer that was the Debtor's pre-petition purported assignment of the trademark to F.G.R. Management, Inc., and the state court ordered pre-petition transfer of an interest in the proceeds of the sale of the Debtor's trademark to the Defendants were subject to avoidance proceedings by the Chapter 7 Trustee under Section 547 (Preferences), and Section 548 (Fraudulent transfers). These transfers were also subject to the Trustee's ability to recover property or value under Section 550. Before the Trustee could

attempt these actions for the benefit of all creditors, the assets and the proceeds of the sale of the assets were collected by the Defendants without requesting or obtaining relief from the automatic stay. The Trustee's successful prosecution of these actions could have resulted in the return of the transferred assets, or a recover of their value for the benefit of all creditors of the estate.

As of the commencement of the case, the Defendants were the holders of a general unsecured claim against the Debtor that was based on the 1988 Missouri circuit Court judgment. As a result of subsequent Missouri Circuit Court orders dated July 16, 1991 and September 30, 1991, the Defendants claimed an interest in the proceeds of the sale of the assets described by the State Court as the "servicemark, trademark and tradename 'Just Brakes' and the associated goodwill, and other assets of Just Brakes Corporate Systems, Inc.". (File Document No. 36, Exhibits No. 12 and 14, **Memorandum In Support Of Plaintiff's [Trustee's] Motion For Summary Judgment**.) Nothing in this record suggests that the Defendants have claimed a pre-petition lien on the Debtor's assets. The sale of the Debtor's assets did not take place until after the commencement of this bankruptcy case, and the record has not shown that the Defendants held a legal security interest or lien in the assets to be sold or in the proceeds of the sale prior to the commencement of the case. As noted below, the post-petition Missouri State Court Order that allowed the sale to proceed after the commencement of this case anticipated further proceedings as to the validity of the sale. Therefore, the record has not shown that as of the

commencement of the case or immediately thereafter, the Defendants held any interest in the trademark or the proceeds of the sale of the trademark that was greater than the interest of the Trustee on behalf of the bankruptcy estate.

Post-Petition Transfers

After the commencement of this case the state court denied the Debtor's and the state-court Defendants' objections, granted the request of the bankruptcy court Defendants, and allowed the foreclosure sale to proceed, directing that the sale proceeds be held in escrow "until such time as [state court] Defendants have exhausted their legal remedies contesting the validity of the October 15, 1991 sale, or until further order of court." (File Document No. 36, Exhibit No. 15) Notwithstanding the operation of the automatic stay, the Defendants in this proceeding applied to the state court and were granted pay-out of the net sale proceeds. (File Document No. 36, Exhibit No. 17.) This collection action was a willful violation of the automatic stay. In an unrelated decision entered by the Eighth Circuit Bankruptcy Appellate Panel after the entry of the Court of Appeals opinion in this matter, it was decided that an action taken in violation of the automatic stay is void ab initio. **LaBarge v. Vierkant (In re Vierkant)**, 240 B.R. 317, 325 (8th Cir. B.A.P. 1999). In the matter being considered here, the Defendants' action taken in violation of the automatic stay voids the post-petition transfers that were the sale of the trademark, and the pay-out of the proceeds to the Defendants.

Voiding these two transfers places these Parties in their respective positions as of the commencement of

the case. It may be argued that in addition to the void transfers, the Trustee is entitled to equitable compensation and reimbursement for the benefit of the estate for his costs and attorney's fees, and for the delay associated with returning the parties to their positions as anticipated by the Bankruptcy Code. However, at this advanced state in these proceedings, obtaining a meaningful and beneficial result from the void court-ordered sale of the trademark and the void pay-out of the proceeds may be impractical and unnecessary in view of the equitable remedy entered here. Therefore, an application for attorney's fees is more appropriately considered as part of the costs of administration in the Chapter 7 case.

In addition to the Court's determination that the post-petition transfers are void as a result of the violation of the automatic stay, a trustee enjoys other powers of recovery in these circumstances. Under Section 549, and subject to certain exceptions that do not apply here, a trustee may avoid a transfer of property of the estate that occurs after the commencement of the case, and that is authorized only under Section 303(f) (involuntary proceedings) or Section 542(c)(lack of knowledge of the commencement of the case), and that is not authorized under Title 11 or by the Court. The post-petition transfers of the estate interest in the trademark and in the trademark sale proceeds were subject to avoidance proceedings by the Trustee under Section 549, and recover proceedings under Section 550. The Trustee's successful prosecution of these actions would have resulted in the recovery of the sale proceeds for the benefit of all creditors of the estate.

Equitable Compensation

In view of the recent decisional law and determinations referred to in this Memorandum, the matter on remand is limited to fixing the remedy for a violation of the automatic stay. It does not require a determination of the extent of the estate interest in pre-petition assets or post-petition assets; or an extensive examination of the probability of the success of any Trustee actions under Chapter 5 of the Bankruptcy Code to avoid pre-petition or post-petition transfers. An estate interest in the assets has been established; the estate interest has not been shown to have been defeated or subordinated by the Defendants' pre-petition interests; and the trustee's power to avoid transfers and recover property is well-grounded in federal and state law as noted above. These interests and powers are protected by the automatic stay for the benefit of all creditors of the estate. As a result of the Defendants' willful violation of the automatic stay, the bankruptcy estate has been adversely affected; assets have not been administered upon; the administration of the estate has been delayed; and the estate has incurred unnecessary expenses in attempting to enforce a tool that is basic to the Title 11 concept of equitable liquidation and distribution of assets: the automatic stay. Therefore, the equitable compensation in these circumstances must include a consideration of the matters discussed above; a consideration of the extent of the delays that have resulted from the violation of the automatic stay; a consideration of the likelihood of returning the parties and their interests to the status as of a time after commencement of the case and before the violation occurred; and a consideration of the costs and expenses to the estate that are reasonably associated with the

Trustee's actions to enforce the provisions of Section 362.

As a result of the willful violation of the automatic stay, the actions that were the post-petition sale of the trademark and the post-petition pay-out of the proceeds to the Defendants are void in this bankruptcy case. As a result of the void sale, the trademark is subject to any claim of interest of the purchasers (if different from these entities); to the interest of the Chapter 7 Trustee under Section 541; and to any claim of interest that may be argued by the Defendants as a result of the pre-petition judgments. As a result of the void pay-out, the sale proceeds are subject to a return to the purchasers. If the estate is to realize a beneficial value from the realignment that resulted from the violation of the automatic stay, further action may be required.

The lengthy history of this case suggests that additional litigation, expense and delay will be required before action to correct the void transfers returns the parties to their respective positions as of the commencement of the case. It is also quite possible that the return of the trademark may be impractical or impossible. Even if the results of the now void actions can be absolutely set aside, it is very likely that collection of these assets for distribution in this case will also require further litigation, expense and delay. A more reasoned approach is to enter an award of equitable compensation to the Trustee based on the considerations discussed above. Equity suggests that, upon payment of the equitable compensation award to the Trustee, the best interests of all parties will be served by attempting to preserve the effects of the void sale and pay-out, and by allowing the Defendants to

submit a proof of claim in this Chapter 7 case along with other creditors of the estate.

The reasonable remedy here is the award of equitable compensation in the form of a money judgment to the Trustee equal to the net sale proceeds, plus the interest that has accrued since the violation of the automatic stay. This award is to be administered by the Trustee as an asset of the bankruptcy estate for the benefit of all creditors.

Consistent with the determination that it may be impossible to realize the beneficial results of the voided sale of the Debtor's trademark and the pay-out, the Court finds and concludes that upon payment of the equitable compensation award to the Trustee, it is highly probably that the bankruptcy estate interest in the Debtor's trademark and the bankruptcy estate interest in the proceeds of the sale, will become burdensome to the estate or of inconsequential value to the estate. The bankruptcy estate interests would then be subject to a request for abandonment under 11 U.S.C. § 554, or subject to other appropriate requests under 11 U.S.C. § 362(d). In view of these determinations, the Trustee's request for separate compensation for attorneys fees in this matter will be denied without prejudice to submission of Counsel's request for compensation and reimbursement with notice to all creditors and parties in interest as part of the administrative expenses of the estate. A separate Order will be entered.

(signature)
James J. Barta
Chief U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	
	Adv. No. 92-4394-172
JUST BRAKES CORPORATE SYSTEMS, INC.,	
	Case No. 91-46519-172
Debtor	
	CHAPTER 7 PROCEEDING
DAVID A SOSNE, Trustee,	
Plaintiff,)	
v	
REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	
Defendants	

ORDER

At St. Louis, in this District, this 29th day of June, 2000.

On consideration of the record as a whole, and as set out in the Memorandum in this matter.

IT IS ORDERED that this matter is concluded, and that pursuant to the mandate of the United States District Court for the Eastern District of Missouri, and consistent with the opinion of the Eighth Circuit United States Court of Appeals, the Plaintiff's motion for summary judgment is granted, and that judgment in this matter is entered in favor of David A. Sosne, Trustee, Plaintiff, and against Reinert & Duree, P.C., Gary Robbins

[sic], Robbins & Associates, Inc., Estes & Estes, Inc., and James C. Landes, Defendants; and

That as equitable compensation for willful violation of the automatic stay of 11 U.S.C. § 362(a), the Defendants are to pay to the Plaintiff for the benefit of the estate, the amount of $100,717.00, plus interest from October 15, 1991, the date of the sale of the assets, through the date of payment; and

That payment of the equitable compensation awarded in this matter shall be a basis for consideration of a request to abandon the bankruptcy estate interest in the Debtor's trademark and in the proceeds of the sale of the Debtor's trademark as being burdensome to the estate or of inconsequential value to the estate, or as a basis for consideration of other appropriate relief; and

That the Trustee's request for a separate allowance of costs and attorney's fees in this proceeding is denied; and

That all other requests in this matter are denied.

(signature)
James J. Barta
Chief U.S. Bankruptcy Judge

IN THE CIRCUIT COURT
OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

GARY ROBBINS, et al.,	)	
	)	
Plaintiffs,	)	Cause No. 542798
	)	
vs.	)	Team B
	)	
DANIEL ARCHAMBAULT, et al.,	)	[Filed Sep 28 1988
	)	Div. 13]
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This case involves the sale by Just Brakes Corporate Systems, Inc., as franchisor of four franchises for the operation of shops for the repair of automobile brakes. The four franchisees, along with others, brought this action against the franchisor along with two individuals and a fifth franchisee as additional defendants.

The thirty-nine page request by defendant for findings of fact is not susceptible to reasonable compliance. The request contains seventy-seven numbered paragraphs and numerous sub-paragraphs. The request of defendant's position as to the facts and each narrative paragraph contains its own recitation of assorted multiple facts.

In addition, the request contains numerous facts which are not necessary to a decision in this case and numerous conclusions of law.

The Court will make such finding on controverted issues as it deems necessary to its decision.

Here follows a statement of the essential facts in this case which the Court finds to be true.

Findings of Fact

A brief history shows that in 1982 defendant Patrick Nolin and Daniel Archambault formed a Missouri corporation named Daniels Automotive, Inc. which is also named as a defendant in this case. In 1984, Archambault and Nolin incorporated defendant Just Brakes Corporate Systems, Inc., hereafter referred to as Just Brakes. Daniels Automotive then opened three Just Brakes stores, Store No. 1 on Hampton Avenue, Store No. 2 on Manchester and Store No. 3 on McDonnell Boulevard. Daniels Automotive acquired a trademark for the use of the name "Just Brakes" which it transferred to defendant Just Brakes in 1984 at which time Just Brakes began selling franchises for Just Brakes stores.

Plaintiff Robbins and Associates, Inc. paid Twenty-Three Thousand Five Hundred Dollars ($23,500.00) to Just Brakes in July of 1984, for a franchise to operate a Just Brakes store. Robbins then purchased the good will and equipment of Store No. 1 from Daniels Automotives. Plaintiff Akers and Associates, Inc. in June of 1985 paid Just Brakes Twenty-Three Thousand Five Hundred Dollars ($23,500.00) for a franchise and then purchased Store No. 2 from Daniels Automotive. In February of 1985, Estes and Estes, Inc. paid Just Brakes Twenty-Three Thousand Five Hundred Dollars ($23,500.00) for a Just Brakes franchise and in August of that year, opened a Just Brakes store in St. Charles County. In February of 1985, James Landes paid Just Brakes Twenty-Three Thousand Five Hundred Dollars ($23,500.00) for a Just

Brakes franchise and in April of that year opened a store on Butler Hill Road in south St. Louis County.

In its dealings with each of the franchisee plaintiffs and in its efforts to induce these plaintiffs to purchase franchisees in Just Brakes, Just Brakes deliberately mislead plaintiffs as to various facts. Daniel Archambault, on behalf of Just Brakes, created a totally unrealistic image of Just Brakes in the minds of plaintiffs and deliberately withheld information which he knew was not available to plaintiffs.

Some of the false statements made to plaintiffs were as to the existence of present facts which defendant Just Brakes knew to be false.

Here follows a list of the fraudulent misrepresentations included in this category:

Plaintiffs Robbins, Akers and Landes were advised that Just Brakes had made arrangements for its franchisees to receive discounts on purchases from suppliers, when in fact no such arrangements had been made.

The offering circular supplied by Just Brakes to all of the plaintiffs lists F. Herbert Kelley, Jr. as Director of Franchise Operations; Darryl D. Dunn as Director of Training and Personnel; Jeff Stieren as Director of Support Systems and Purchasing and Robert Quest as Purchasing and Quality Control. The last three were listed as the training staff. In fact, none of these four people were ever employed by Just Brakes.

Akers, Landes and Estes were advised that the three separate stores operated by Daniels Automotive were profitable, where in fact, they were not.

Plaintiffs were promised a training program, when in fact, Just Brakes had neither the facilities or the personnel to offer or provide such a program and although requested

repeatedly by Akers, Landes and Estes, Just Brakes never provided them with an adequate training program.

Plaintiff Estes had but Thirty-Five Thousand Dollars ($35,000.00) in capital available. Just Brakes was full aware that this amount was totally inadequate to start a franchise operation and in fact, Just Brakes offering circular specifies that a substantially larger amount is needed. However, in order to induce Mr. Estes to pay his Twenty-Three Thousand Five Hundred Dollars ($23,500.00) for a franchise fee, Just Brakes assured him that his available capital was adequate to start and operate a store.

In addition to the above, Just Brakes made a number of promises to plaintiffs as to certain performances Just Brakes was going to provide in the future. In making these promises, Just Brakes deliberately failed to disclose to plaintiffs the existence of several facts of which Just Brakes was aware which in fact, made the possibility of performance by Just Brakes of these future promises, certainly contingent and probably highly unlikely.

Just Brakes advised plaintiffs that there would be an extensive advertising program in the future which would cover television, radio and newspaper, that there would be a central warehouse and that they would develop a training center. Also promised were detailed operating manuals. Akers, Landes and Estes were never provided with complete operating manuals. While making these promises, Just Brakes failed to advise plaintiffs that it (Just Brakes) was inadequately financed and did not have the financial ability to carry through with its grandiose promises as to the future. Just Brakes failed to advise plaintiffs that the only way Just Brakes could ever finance the operations it promised, was to sell a substantial number of franchises. This, it never did and in fact never had any real prospects of doing so.

The Franchisees justifiably relief on these various false representations of fact by Just Brakes and were damaged thereby.

Each of the franchisee plaintiffs (Robbins & Associates, Inc., Akers and Associates, Inc., Estes and Estes, Inc. and James Landes) was damaged as a result of these misrepresentations in the amount of Twenty-Three Thousand Five Hundred Dollars ($23,500.00) which each of these plaintiffs paid to Just Brakes for its franchise fee.

As to Count II of defendant's counterclaim, the Court finds that plaintiff Gary Robbins paid Nineteen Thousand Eighty-Three Dollars and Thirty-Three Cents ($19,083.33) to satisfy his personal liability as a result of his guarantee of a note in the amount of Twenty-Five Thousand Dollars ($25,000.00) from Just Brakes to Lewis & Clark Mercantile Bank. Plaintiff Gary Robbins is entitled to recovery from Just Brakes for that Amount.

JUDGMENT

As to Count II of Plaintiff's Petition, the Court enters Judgment in favor of Robbins & Associates and against defendants Daniel Archambault and Just Brakes Corporate Systems, Inc. in the amount of Twenty-Three Thousand Five Hundred Dollars ($23,500.00) plus interest thereon in the amount of nine percent (9%) from and after July 1, 1984. The Court further enters Judgment in the amount of Two Thousand Five Hundred Dollars ($2,500.00) in favor of plaintiff Robbins & Associates and against defendant Daniel Archambault as and for punitive damages. The Court further enters Judgment in the amount of Twenty-Five Hundred Dollars ($2,500.00) in favor of plaintiff Robbins & Associates, Inc. and against

defendant Just Brakes Corporate Systems, Inc. as and for punitive damages.

As to Count III of Plaintiff's Petition, the Court enters Judgment in favor of Akers and Associates and against defendants Daniel Archambault and Just Brakes Corporate Systems, Inc. in the amount of Twenty-Three Thousand Five Hundred Dollars ($23,500.00) plus interest thereon in the amount of nine percent (9%) from and after June 1, 1985. The Court further enters Judgment in the amount of Two Thousand Five Hundred Dollars ($2,500.00) in favor of plaintiff Akers and Associates and against defendant Daniel Archambault as and for punitive damages. The Court further enters Judgment in the amount of Twenty-Five Hundred Dollars ($2,500.00) in favor of plaintiff Akers and Associates and against defendant Just Brakes Corporate Systems, Inc. as and for punitive damages.

As to Count IV of Plaintiffs Petition, the Court enters Judgment in favor of Estes and Estes, Inc. and against defendants Daniel Archambault and Just Brakes Corporate Systems, Inc. in the amount of Twenty-Three Thousand Five Hundred Dollars ($23,500.00) plus interest thereon in the amount of nine percent (9%) from and after March 1, 1985. The Court further enters Judgment in the amount of Two Thousand Five Hundred Dollars ($2,500.00) in favor of plaintiff Estes and Estes, Inc. and against defendant Daniel Archambault as and for punitive damages. The Court further enters Judgment in the amount of Twenty-Five Hundred Dollars ($2,500.00) in favor of plaintiff Estes and Estes, Inc. and against defendant Just Brakes Corporate Systems, Inc. as and for punitive damages.

As to Count V of Plaintiff's Petition, the Court enters Judgment in favor of James Landes and against defendants Daniel Archambault and Just Brakes Corporate Systems, Inc.

in the amount of Twenty-Three Thousand Five Hundred Dollars ($23,500.00) plus interest thereon in the amount of nine percent (9%) from and after March 1, 1985. The Court further enters Judgment in the amount of Two Thousand Five Hundred Dollars ($2,500.00) in favor of plaintiff James Landes and against defendant Daniel Archambault as and for punitive damages. The Court further enters Judgment in the amount of Twenty-Five Hundred Dollars ($2,500.00) in favor of plaintiff James Landes and against defendant Just Brakes Corporate Systems, Inc. as and for punitive damages.

Since the Court finds that a substantial portion of the payment of the Twenty-Three Thousand Five Hundred Dollars ($23,500.00) franchise fee by each of the above plaintiffs was for the purpose of acquiring the right to the use of the trade name "Just Brakes", the Court orders that each of the above franchisee plaintiff's shall have full rights to the use of the trade name "Just Brakes" in their business until the above Judgments have been fully satisfied.

As to Count IX of the counterclaim of defendant Just Brakes and although there does not appear to be an answer by plaintiff Gary Robbins to this counterclaim or a prayer for relief by plaintiff Gary Robbins, under the evidence and under the prayer for declaratory judgment by Just Brakes in its counterclaim, the Court enters Judgment in favor of plaintiff Gary Robbins and against defendant Just Brakes Corporate Systems, Inc. in the amount of Nineteen Thousand Eighty-Three Dollars and Thirty-Three Cents ($19,083.33) plus interest thereon from and after December 18, 1987.

Judgment is entered against plaintiffs and in favor of defendants Patrick Nolin and Daniels Automotive.

SO ORDERED
Alphonso H. Voqrhees, Judge

Entered this 28th day of September, 1988